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REPORTS OF CASES

DETERMINED IN THE

2111. 11/

SUPREME COURT

OF THE

STATE OF WASHINGTON

CONTAINING

DECISIONS RENDERED FROM JANUARY 14 TO APRIL 22,
1901, INCLUSIVE.

EUGENE G. KREIDER
REPORTER.

VOLUME XXIV

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JUDGES OF THE SUPREME COURT OF THE STATE OF WASHINGTON

HON. JAMES BRADLY REAVIS* . . CHIEF JUSTICE.
HON. THOMAS J. ANDERS JUDGE.
HON. MARK A. FULLERTON . . . JUDGE.
HON. RALPH O. DUNBAR† JUDGE.
HON. WALLACE MOUNT† JUDGE.
HON. WILLIAM H. WHITE‡ . . . JUDGE.
HON. HIRAM E. HADLEY‡. . . . JUDGE.

C. S. REINHART *Clerk*
W. B. STRATTON *Attorney General*
C. C. DALTON *Ass't Attorney General*
E. W. ROSS *Ass't Attorney General*

*Succeeded Judge Dunbar as Chief Justice January 14, 1901.

†Elected November 6, 1900, to fill terms beginning January 14, 1901.

‡Appointed by Governor Rogers on March 20, 1901, pursuant to act of March 18, 1901, temporarily increasing number of judges.

JUDGES OF THE SUPERIOR COURTS OF THE STATE OF WASHINGTON*

COUNTIES.	JUDGES.
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Lincoln, Okanogan, Douglas and Adams,	HON. CHARLES H. NEAL.
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Skagit and San Juan, . . .	HON. GEORGE A. JOINER.
Kitsap and Snohomish, . . .	HON. JOHN C. DENNEY.
Whatcom,	{ HON. HIRAM E. HADLEY. HON. JERE NETERER.§

*Elected for term beginning January 14, 1901.

†Appointed by Governor Rogers January 29, 1901, under act increasing number of judges for Spokane county.

‡Appointed by Governor Rogers February 18, 1901, under act increasing number of judges for King county.

§Appointed by Governor Rogers March 27, 1901, to fill vacancy caused by resignation of Judge Hadley.

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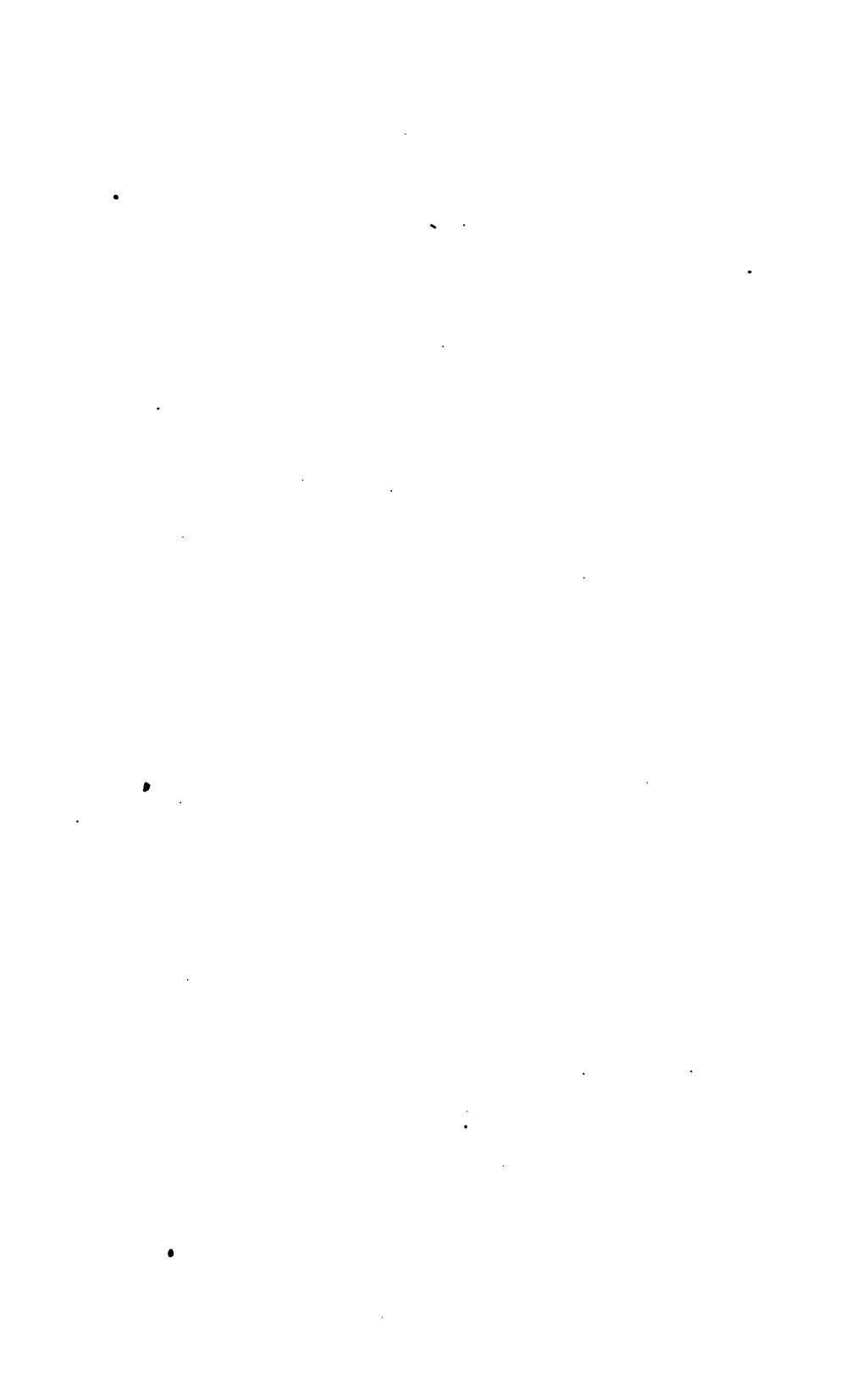
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ERRATA

- Page 135. Running title, top of page, read *Chehalis Boom Co. v. Chehalis County* instead of "Shannon v. Consolidated, etc., Mining Co."
- Page 172. Fifth line from bottom, read *rested* instead of "rested."
- Page 309. Fifth line of syllabus, omit word "the" before "bottomry."
- Page 331. Top of page, read *Reavis, C. J.* instead of "Mount, J."
- Page 336. Catch words to syllabus, read *judicata* instead of "judicita."
- Page 421. Catch words to syllabus, read *conclusiveness* instead of "conclusions."
- Page 582. Second line from bottom of syllabus, read *from* instead of "for."
- Page 605. Ninth line from bottom, read *incumbrance* instead of "Incumbrance."



REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF WASHINGTON.

[No. 3541. Decided January 14, 1901.]

FIDELITY NATIONAL BANK OF SPOKANE, *Appellant*, v. D.
W. HENLEY *et al.*, *Respondents*.

ASSIGNMENT — MONEYS RETAINED ON GOVERNMENT CONTRACT —
BREACH BY CONTRACTOR — COMPLETION BY SURETIES — RIGHTS OF
ASSIGNEE.

An assignment by a contractor of all moneys due or to become due under his contract for a public building, under which twenty per cent. of the moneys earned from time to time was to be retained by the government until the completion and acceptance of the work, passed to the assignee the equitable title in such twenty per cent., and the assignee was entitled thereto as against the sureties on the contractor's bond, by whom the work had been completed after the default of the contractor.

SAME — PAYMENT TO SURETIES — ASSUMPSIT BY ASSIGNEE AGAINST SURETIES.

Where moneys due under a government contract were paid to the sureties on the contractor's bond, who had completed the work on his default, rather than to an assignee to whom they were payable under an assignment by the contractor, of which all parties had notice, an action will lie directly against the sureties by the assignee to recover such moneys, although there is no privity of contract between them, under the rule that where one receives money under such circumstances as make it against

conscience that he retain it, even though he has received it under a claim of right, an action for money had and received will lie at the instance of the party to whom it rightfully belongs.

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge. Reversed.

Happy & Hindman, for appellant.

Henley, Kellam & Lindsley and *A. G. Avery*, for respondents:

Where two parties claim payment of the same fund, and one of them is recognized and paid to the exclusion of the other, who was in fact the one entitled, the latter cannot maintain an action for money had and received against the former, he having received it under a claim of right. *Butterworth v. Gould*, 41 N. Y. 450; *Shultz v. Boyd*, 52 N. E. 750; *Dumois v. Hill*, 37 N. Y. Supp. 1093; *Sergeant v. Stryker*, 32 Am. Dec. 404; *Corey v. Webber*, 96 Mich. 357; *Nolan v. Manton*, 46 N. J. Law, 231 (50 Am. Rep. 403); *Trumbull v. Campbell*, 3 Gil. 502; *Neill v. Chesson*, 15 Ill. App. 266; 2 Enc. Pl. & Pr. 1021.

The opinion of the court was delivered by

DUNBAR, J.—On July 1, 1897, the United States entered into a contract with one N. B. Rundle to construct buildings at the army post near Spokane, and in said contract it was provided, among other things, that payments upon the same were to be made from time to time as the work progressed, and that from all payments twenty per cent. was to be retained until the completion of the work and the acceptance of the same by the government. At the time of making this contract, Rundle, as principal, and respondents herein, as sureties, subsequently to the ex-

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execution of the contract, executed a bond for the faithful performance of the contract by Rundle. In consideration of the advancement of money by the appellant to enable Rundle to comply with such contract, Rundle executed and delivered to appellant a written assignment of the money due or to become due from the United States for the construction of the said buildings, and authorized and empowered it to collect, receive, and receipt for said moneys. The assistant quartermaster of the United States in charge of the construction of said work was at once notified of this assignment, and consented thereto. Relying upon this assignment, appellant advanced to Rundle something over \$47,000, only about \$24,000 of which has been paid. The money advanced went to pay for material and labor which were used in the construction of the building. On the 13th day of August, 1898, there was in the hands of the United States \$6,186.40, which had been earned by Rundle and which was held back by the government under the terms of the contract. At said date, Rundle failing to comply with the conditions of said contract, the respondents, as sureties, took up the work where Rundle left off and completed the same, having, before they commenced work, been notified by the appellant of the assignment to it of the twenty per cent. held back by the government. They thereafter, however, received the same from the United States and refused to pay it over to the appellant upon demand. Action was brought against the respondent by this appellant, on February 23, 1899, for said sum of money, and the matters and things before enumerated constituted the important part of the complaint. Respondents answered and as a separate defense alleged the fact to be that they were sureties on the bond of Rundle and that, when he made his default, they, as sureties, took the contract off

his hands and completed the same, and that the United States promised to pay to them the twenty per cent. held back. To this further answer a demurrer was interposed, on the ground that the same did not state facts sufficient to constitute a cause of defense to plaintiff's action, which demurrer was overruled and exceptions taken. Appellant refusing to plead further, judgment for costs was entered against it, from which judgment this appeal is taken.

This case involves the determination of the question whether or not, at the time of making this assignment, Rundle had such an interest in the fund to be so held back by the government that he could assign the same to the appellant and vest the appellant with the title to said fund; and whether an action would lie against the respondents by the appellant for the recovery of such money. We think these questions must be answered in the affirmative. There are some cases, the most of which are early ones, holding that where two claimants for the same service apply for payment to the party bound to pay, and one of them is recognized as having a just claim and is paid to the exclusion of the other, who was in fact the one entitled, the party thus excluded derives no title, against the party receiving payment, to the money paid, and that there is no such privity between the parties as will enable the party entitled to the money to maintain an action for the same against the party receiving it. This doctrine was announced in *Patrick v. Metcalf*, 37 N. Y. 332, and was for a time followed by the courts of New York and some few other states, though in that case we think there was a futile effort made to distinguish the case of *Bradley v. Root*, 5 Paige, 632. There the holder of the mail contract from the postoffice department assigned it to the complainant, who took upon himself the

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duty of carrying the mail according to the contract, during its continuance, and was to receive therefor all the moneys which should become payable under the contract, according to the terms thereof. No notice of this assignment was given to the postmaster general. Afterwards the assignor, who was insolvent, gave the defendant an order upon the postmaster general for the moneys which might become payable on the contract, to indemnify him against a responsibility which he had incurred as indorser for the assignor. The defendant took the order, having notice of the assignment. After the moneys had been earned by the complainant under the contract, the defendant presented his order to the postmaster general and received thereon \$430. It was held by the chancellor that he was equitably bound to pay it over to the complainant. The latter New York cases, however, have been inclined to abandon the doctrine of *Patrick v. Metcalf*, *supra*, and go back to the rule announced in *Bradley v. Root*, *supra*. In *Roberts v. Ely*, 113 N. Y. 128 (20 N. E. 606), the court, in commenting upon this question, said:

“Assuming that the plaintiff is right in his construction of the facts, the case falls within the familiar doctrine that money in the hands of one person, to which another is equitably entitled, may be recovered in a common-law action by the equitable owner upon an implied promise arising from the duty of the person in possession to account for and pay over the same to the person beneficially entitled. The action for money had and received to the use of another is the form in which courts of common law enforce the equitable obligation. The scope of this remedy has been gradually extended to embrace many cases which were originally cognizable only in courts of equity. Whenever one person has in his possession money which he cannot conscientiously retain from another, the latter may recover it in this form of action, subject to

the restriction that the mode of trial and the relief which can be given in a legal action are adapted to the exigencies of the particular case, and that the transaction is capable of adjustment by that procedure, without prejudice to the interests of third persons. No privity of contract between the parties is required, except that which results from the circumstances. The right on the one side, and the correlative duty on the other, create the necessary privity and justify the implication of a promise by the defendant to do that which justice and equity require."

See, also, *Hathaway v. Town of Cincinnati*, 62 N. Y. 434, and *In re Le Blanc*, 14 Hun, 8.

In *Moore v. Shields*, 121 Ind. 267 (23 N. E. 89), it was held that, in an action for money had and received, there need be proved no privity of contract other than such as arises out of the fact that the defendant has received the plaintiff's money under circumstances which make it against conscience that he should retain it. In *Allen v. Stenger*, 74 Ill. 119, it was said:

"Assumpsit always lies to recover money due on simple contract. And this kind of equitable action to recover back money which ought not in justice to be kept is very beneficial, and, therefore, much encouraged. It lies only for money which, *ex equo et bono*, the defendant ought to refund. When, therefore, according to this rule, one person obtains the money of another, which it is inequitable or unjust for him to retain, the person entitled to it may maintain an action for money had and received for its recovery. And it is not necessary that there should be an express promise, as the law implies a promise. The scope of the action has been enlarged until it embraces a great variety of cases, the usual test being, does the money, in justice, belong to the plaintiff, and has the defendant received the money, and should he in justice and right return it to plaintiff? These facts create a privity, and the law implies the promise to pay."

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This doctrine is sustained by *Wilson v. Turner*, 164 Ill. 398 (45 N. E. 820); *Belden v. Perkins*, 78 Ill. 449; *Farmers' National Bank v. Robinson* (Kan.), 53 Pac. 762, and a multitude of other cases.

Outside of other authority, however, the question has been decided by this court in *Soderberg v. King County*, 15 Wash. 194 (45 Pac. 785, 33 L. R. A. 670, 55 Am. St. Rep. 878), where it was held that assumpsit would lie against the county for the recovery of sums charged by the sheriff as commissions upon foreclosure sales and by him mistakenly paid into the treasury, when such sums constitute a surplus in his hands to which the judgment debtor is entitled. In that case we cited:

Pimental v. San Francisco, 21 Cal. 352; *Bank of Metropolis v. First National Bank*, 19 Fed. 301; *Bayne v. United States*, 93 U. S. 642; *State v. Village of St. Johnsbury*, 59 Vt. 332 (10 Atl. 531); *Attorney General v. Perry*, 2 Comyns, 481; *Haebler v. Myers*, 132 N. Y. 363 (30 N. E. 963, 15 L. R. A. 588, 28 Am. St. Rep. 589); *United States v. State Bank*, 96 U. S. 30; *Criswell v. Whitney*, 13 Ind. App. 67 (41 N. E. 78); *Board of Education v. Robinson*, 7 N. M. 231 (34 Pac. 295); *Brand v. Williams*, 29 Minn. 238 (13 N. W. 42); *Knapp v. Hobbs*, 50 N. H. 476.

We think there can be no question but that the assignment in this case is supported by almost universal authority. See *East Lewisburg Lumber & Mfg. Co. v. Marsh*, 91 Pa. St. 96; *Hawley v. Bristol*, 39 Conn. 26.

Again, it must not be forgotten that the respondents were sureties of Rundle, the defaulting contractor. It will not be claimed that Rundle would have had a defense to this action if he had succeeded in obtaining the money from the United States after having made an as-

signment of the funds to the bank. We think the sureties stand in no better position than the principal. It was doubtless upon the strength of the bond furnished that the bank advanced the money to Rundle for the purpose of carrying out his contract, and when the sureties took up the work that Rundle had abandoned and carried it forward to completion, they simply placed themselves in the position which Rundle had occupied, aided in this endeavor by the money which Rundle had obtained from the bank and which had been expended in performing the contract.

We think the court erred in overruling the demurrer to the respondent's defense, and the judgment will therefore be reversed, and the cause remanded with instruction to sustain said demurrer.

ANDERS, FULLERTON and REAVIS, JJ., concur.

[No. 3613. Decided January 17, 1901.]

FRANZ FREUNDT, *Respondent*, v. CHARLES HAHN *et ux.*,
Appellants.

LIMITATION OF ACTIONS — CONTRACTS BY RESIDENTS OF ANOTHER STATE — WHEN LAW OF FORMER GOVERNS.

Bal. Code, § 4818, which provides that "when a cause of action has arisen in another state, territory, or country between non-residents of this state, and by the laws of the state, territory, or country where the action arose an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state," is inapplicable in the case of an action upon a promissory note by a resident of this state against a non-resident, although at the time of the execution of the note both plaintiff and defendant were non-residents, where plaintiff had taken up his residence within this state prior to the maturity of the note.

Jan. 1901.] Opinion of the Court—REAVIS, C. J.

Appeal from Superior Court, King County.—Hon E. D. BENSON, Judge. Affirmed.

Fred H. Peterson, for appellants.

Adolph Munter, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—Action brought in March, 1899, against appellants, who were then and at all times mentioned residents of California; jurisdiction was obtained by attachment in this state, to recover upon two promissory notes executed by Charles Hahn and one R. Wittke. There are two causes of action alleged in the complaint, which are identical except as to the amounts of the notes and the allegations of payment thereon. The first note was for \$1,200, made in Los Angeles, Cal. February 7, 1888, and the last payment thereon made January 19, 1895. The second note was for \$1,000, made at the same time and place, and the last payment was made at the same date as upon the other note.

The substantial defense to the action was that no action could be maintained upon either of the notes because the statute of limitations of California barred the action after four years from the maturity of the notes, and by reason of § 4818, Bal. Code, the statute of limitations of California pleaded here was applicable, and the bar of the California statute was a complete defense. Section 4818, *supra*, is as follows:

“When the cause of action has arisen in another state, territory, or country between non-residents of this state, and by the laws of the state, territory, or country where the action arose an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state.”

The determination of the question depends upon the meaning of the words "arisen" and "arose" in the section quoted. Counsel for appellants maintains that the words "arisen" and "arose" are used in the sense of "originated," and therefore that, as the notes were executed and payable in California, the cause of action "arose" at the time the notes were executed; that those words are not used in the sense of "accrued," which specially means when the right to sue exists. The word "arise," it is true, has not been used with uniform signification in different statutes. Thus, in the case cited by counsel—*Emerson v. Steamboat Shawano City*, 10 Wis. 433—the court remarked: "A cause of action may be said to arise, when the contract out of which it grows is entered into or made." Also, *Steele v. Commissioners of Rutherford*, 70 N. C. 139, where a statute provided that actions must be tried in the county where the cause, or some part thereof, arose, it was held that the expression, "where the cause of action arose," meant where a debt was contracted, and not the place of the failure to pay the debt. But it does not appear that an action could not have been maintained in the county where the cause, or some part thereof, arose. It is elementary doctrine that under the common-law rule the statute of limitations of the forum in which the action is brought governs. Section 4818, *supra*, is a modification of the common-law rule, and authorizes the plea of the statute of limitations upon causes of action arising in another state between non-residents of this state. In Illinois a statute of limitations reads as follows: "When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and by the laws thereof an action cannot be maintained by reason of the lapse of time, an action thereon

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shall not be maintained in this state." *Osgood v. Artt*, 10 Fed. 366. The supreme court of Illinois construing this statute said: .

"When a cause of action has arisen, * * * should be construed as meaning when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action, if invoked; or, in other words, when the plaintiff has the right to sue the defendant in the courts of the state upon the particular cause of action, without regard to the place where the cause of action had its origin." *Hyman v. McVeigh*, 10 Leg. News, 157.

See, also, *Berry v. Krone*, 46 Ill. App. 82.

It was admitted at the trial at the times the notes were executed plaintiff and defendants were residents of the state of California; that within one month after the execution and delivery of the notes the plaintiff left the state of California and came to this state where he has continuously resided ever since; and that defendants during the whole time were, and now are, residents of the state of California. It is apparent that during the time plaintiff was a resident of the state of California no cause of action subject to cognizance in the courts existed against the defendants. If the notes had been paid at maturity, no legal cause of action would have existed. It could neither have originated nor arisen until the breach of the contract to pay the money. Before the maturity of the notes, the plaintiff, the payee, was a resident of this state. He was then a resident of this state when the jurisdiction existed in the courts to adjudicate between the parties, and at the time he had a right to sue the defendants. We think, as used in § 4818, *supra*, the cause of action arose between a resident of this

state and a resident of California, and that the California statute of limitations is inapplicable.

The judgment is affirmed.

DUNBAR, FULLERTON and ANDERS, JJ., concur.

[No. 3824. Decided February 2, 1901.]

THE STATE OF WASHINGTON, *Respondent*, v. EDWARD
B. MENDENHALL, *Appellant*.

FALSE PRETENSES — DEFENSES — PARTNERSHIP.

An executory contract for the division of profits on the sale of goods does not constitute a partnership, so as to exonerate from the crime of larceny one of the parties thereto who fraudulently obtains such goods from the other party by false pretenses.

SAME — AGENCY.

A person who by false and fraudulent pretenses obtains the goods of another cannot escape liability for his crime on the ground that he acted merely as an agent in procuring possession of the goods for his principal.

Appeal from Superior Court, Yakima County.—Hon.
JOHN B. DAVIDSON, Judge. Affirmed.

Henry J. Snively, for appellant.

John J. Rudkin, Prosecuting Attorney, and *Frank H. Rudkin*, for the State.

The opinion of the court was delivered by

DUNBAR, J.—The defendant, a representative of the Copper State Fruit Company, a corporation doing business in Butte, Montana, came to North Yakima for the purpose of buying fruit. The Copper State Fruit Com-

Feb. 1901.] Opinion of the Court—DUNBAR, J.

pany was a commission house engaged in the buying and selling of fruit. In North Yakima the defendant met the prosecuting witness, Perry, who was at the time engaged in purchasing and selling fruit in Yakima county. It was agreed between them that Perry should purchase apples to be shipped to Butte, Montana, and there placed in cold storage and sold, and the net profits, after deducting storage charges, etc., divided between Perry and the Copper State Fruit Company. A draft was to accompany the shipping receipts, and the apples were to be substantially paid for on arrival at Butte, and before delivery. Before this agreement was made, the prosecuting witness had contracted for and purchased a portion of the apples which were afterwards shipped. Before the shipments were made the defendant represented to Perry that he had deposited to his credit in the Yakima National Bank of North Yakima the sum of \$5,000, which Perry could draw against for the purchase price of the apples about to be shipped. It was then stated by Perry to the defendant, in an interrogatory manner, that it would not be necessary for him to draw against the apples when shipped according to the original agreement, and the defendant replied that it would not. According to the testimony of Perry, relying upon the representations that the money had been deposited as stated, and believing the representations to be true, he delivered to defendant the apples in question, which were shipped over the Northern Pacific by the defendant, consigned by the Copper State Fruit Company to the Copper State Fruit Company at Butte. On his return to North Yakima, these representations having been made in the country about twenty miles from town, and after the shipment of the apples, Perry discovered that no money had been placed to his credit in the bank, and immedi-

ately stopped the apples in transit, and subsequently had them restored to him. Thereupon he filed an information, the charging part being as follows:

"He, the said Edward B. Mendenhall, on the 24th day of October, 1899, A. D., in the county of Yakima, state of Washington, then and there being, did then and there unlawfully, feloniously, and designedly obtain from one J. M. Perry four car-loads of apples, of the value of two thousand six hundred and fifty dollars, lawful money of the United States, of the goods and chattels of him, the said J. M. Perry, by then and there unlawfully, feloniously, designedly, and falsely representing and pretending to him, the said J. M. Perry, that he, the said Edward B. Mendenhall, had theretofore deposited and placed in the Yakima National Bank of North Yakima, Washington, the sum and amount of five thousand dollars, lawful money of the United States, to the credit and in the name of him, the said J. M. Perry, in payment for the purchase price of said four car-loads of apples, which said representation and pretense so made the said Edward B. Mendenhall then and there well knew to be false and untrue, with intent then and there to defraud him, the said J. M. Perry, contrary to the statutes in such cases made and provided."

The cause came on for trial, and, after the introduction of testimony and instructions of the court, the jury returned a verdict of guilty as charged in the information. Judgment was entered and appeal taken.

Upon the conclusion of the testimony, motion was made by the defendant's attorney to dismiss the case, and the refusal of the court to grant this motion is alleged as the first error. The contention under this assignment of error is that Perry, the prosecuting witness, and the Copper State Fruit Company were partners under the arrangement entered into, and that, therefore, Mendenhall's possession or that of the Copper State Fruit Company

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was Perry's possession, and thus no goods were ever obtained. Many cases are cited to sustain the doctrine that one partner cannot commit larceny of the goods of the partnership; but, as we read the testimony in this case, these authorities are not pertinent, for there was no existing partnership proven. It is true that a certain amount of profits was to be divided between the prosecuting witness and the Copper State Fruit Company after certain conditions were complied with by the company, but the company had not yet bought into the partnership. The contract with the prosecuting witness was purely executory. He bought the fruit and paid for it with his own money and in his own name. He was certainly entitled to possession of it and was the owner of it, and his possession or ownership could not have been interfered with or in any way disturbed by the Copper State Fruit Company at the time the delivery of the fruit was made to the defendant, because the payments agreed upon had not yet been made, and it was upon the theory that the money for the payment of the fruit was deposited in the bank to his credit, and because of his belief in the representation to this effect made by the defendant, that he parted with the possession of the property and delivered it to defendant. The defendant therefore obtained the fruit by fraudulent and false representations, and thereby brought himself under the ban of the law.

The second assignment of error is that the court erred in not granting plaintiff's motion to dismiss because there was a fatal variance between the information and proof. It is insisted that the information charges Edward B. Mendenhall with obtaining the goods mentioned under false pretenses, while the proof shows that Edward B. Mendenhall never obtained the goods, but that, if any person obtained the goods, that person was the Copper

State Fruit Company, of which company Mendenhall was the agent. It is evident from the testimony that if anybody made false and fraudulent pretenses, and obtained the fruit by reason of such misrepresentations, it was the defendant Mendenhall. The plea of agency is not available to one who knowingly commits a crime. We think there is no merit in this assignment.

The question of fact having been submitted to the jury under proper instructions, the judgment is affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

MOUNT, J., not sitting.

[No. 3822. Decided February 7, 1901.]

ED. SETHER, *Plaintiff*, v. F. LEWIS CLARK *et al.*, *Appellants*, FRED PHAIR, *Respondent*.

APPEAL — DISMISSAL — CESSATION OF CONTROVERSY.

An appeal from an order sustaining a demurrer to a cross complaint which seeks to enjoin one of the parties thereto from prosecuting another action involving the same subject matter should be dismissed on the ground of cessation of the controversy, where it appears that, prior to the sustaining of the demurrer, the two actions had been consolidated and would be tried as one cause.

SAME — ANTICIPATION OF ERROR — PRESCRIBING RULES FOR TRIAL COURT.

The supreme court will not lay down rules for the lower court in anticipation of error on the trial of a cause, but will confine itself to the review of errors, when committed.

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge. Appeal dismissed.

Feb. 1901.] Opinion of the Court—MOUNT, J.

Graves & Graves, for appellants.

F. T. Post, for respondent.

The opinion of the court was delivered by

MOUNT, J.—The plaintiff, Sether, sued in equity to foreclose a mechanic's lien for a sum claimed to be due him for materials and labor furnished and performed upon a certain building erected by defendants Clark and Sweeny. His claim is based upon an employment by defendant Russell, who was employed by defendant Phair, the original contractor for the erection of the building upon which the lien was sought to be foreclosed. Russell thereafter filed a cross-complaint in the case, praying the foreclosure of a mechanic's lien for a sum claimed to be due him under his employment. The appellants Clark and Sweeny thereafter answered the original and cross complaint, alleging affirmative defenses to each of the complaints of Sether and Russell. Prior to the commencement of the Sether suit the respondent Phair had commenced an action at law against the appellants Clark and Sweeny alone, to recover damages for an alleged breach of the original contract for the erection of the building above referred to. Thereupon, after the suits above named had been filed, and on June 13, 1900, appellants filed a cross complaint in the case of Sether v. Clark *et al.*, praying for an injunction to prevent the respondent Phair from prosecuting his action at law, and requiring him to plead to the cross complaint of appellants and of Russell, and to plaintiff's complaint, to the end that final judgment may be entered, which shall adjudge and settle the rights of all the parties in one decree. Respondent Phair demurred to the complaint of appellants, and the demurrer was on October 4, 1900, sustained, the complaint dismissed, and an appeal taken

from that order. Prior to the hearing upon said demurrer, and on September 24, 1900, the court had made an order consolidating the said cause of Phair v. Clark *et al.* with said cause of Sether v. Clark *et al.* Motion is now made by respondent in this court to dismiss this appeal, for the reason that the action, before the appeal herein was taken, was consolidated by order of the superior court with the action pending in said court entitled Phair v. Clark *et al.*, being the action the prosecution of which the appellants herein are by their cross complaint seeking to enjoin, the issues of which they seek by said cross complaint to have tried out in this case.

It clearly appears from the record herein that the two cases have heretofore been consolidated and will now be tried as one case. If we were now to consider this case upon its merits and reverse the order of the lower court sustaining the demurrer, the cause would be in no other position than it now is, and much confusion might be occasioned thereby. The controversy as to whether there may be more than one judgment or decree is now at an end; for under the consolidation there will be but one determination of all the matters in issue, and those issues will be determined by a decree which will establish the rights of all parties to the consolidated cases. The consideration of the appeal upon the merits would now serve no useful purpose. This case falls squarely within the rule announced by this court in *Hice v. Orr*, 16 Wash. 163 (47 Pac. 424); *State ex rel. Coiner v. Wickersham*, 16 Wash. 161 (47 Pac. 421); *State ex rel. Daniels v. Prosser*, 16 Wash. 608 (48 Pac. 262); and *State ex rel. Mortgage Co. v. Meacham*, 17 Wash. 429 (50 Pac. 52).

The appellants, in their reply brief, urge this court to establish a rule which shall guide the lower court in the method of trying the consolidated cause. We cannot as-

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Syllabus.

sume that the trial court may not follow the law applicable to the trial of the cause, and therefore shall not assume to lay down any rule which the court shall follow with reference thereto. When error is committed, this court will review it, but it will not anticipate error.

The real controversy between the parties to this appeal having ceased, the appeal should be dismissed.

REAVIS, C. J., and DUNBAR, FULLERTON and ANDERS, JJ., concur.

[No. 3880. Decided February 7, 1901.]

D. S. JOHNSTON, *Appellant*, v. THOMAS McCART *et ux.*,
Respondents.

24	19
31	237
81	282
24	19
37	163

APPEAL — SUFFICIENCY OF EVIDENCE.

It is a settled rule that the supreme court will not on appeal disturb a verdict, where the question of fact involved was properly submitted to the jury, although the court may believe the facts to be otherwise than as found.

REPLEVIN — BURDEN OF PROOF.

In an action of replevin to recover possession of goods sold under a contract in the nature of a conditional sale, the burden of proof is upon plaintiff to establish ownership and right of possession in himself, even although defendant, by an affirmative defense, sets up a plea of payment in full, since such plea in an action of replevin amounts to no more than an allegation of property in defendant, and adds nothing to the answer of general denial.

EVIDENCE — VARIATION OF WRITTEN CONTRACT — CONTEMPORANEOUS ORAL AGREEMENT.

Parol evidence is admissible for the purpose of showing that, by a contemporaneous oral agreement, a written contract between the parties providing for payments of money had been so far modified as to permit the stipulated payments to be rendered in services instead of money.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Pritchard & Harvey, Mendenhall & Strong, and Jerry E. Bronaugh, for appellant:

This court has held that the defense of payment is new matter and must be affirmatively alleged by the defendant. *Roberts v. Washington National Bank*, 11 Wash. 550; *Richards v. Jefferson*, 20 Wash. 166. And it has also been decided by this court that the burden of proof rests upon the party, either plaintiff or defendant, who holds the affirmative of any proposition necessary to be established. *Wright v. Stewart*, 19 Wash. 179. See, also, the following very recent cases supporting this contention: *Turrentine v. Grigsby*, 23 South. 666; *Blass v. Lawhorn*, 64 Ark. 466; *Lakeside Press, etc., Co. v. Campbell*, 22 South. 878; *Harley v. Harley*, 66 Ill. App. 138; *Rhodes v. Webb-Jameson Co.*, 49 N. E. 283.

Graves & Graves, for respondents:

In actions of replevin the defendant may, under the general denial, introduce proof of any circumstance which tends to defeat the plaintiff's right to possession when the action is commenced. It is not necessary for defendant to allege payment as an affirmative defense in order to prove the same upon the trial, and, therefore, in this case the burden of proof is not shifted from the appellant to respondents. *Lillie v. Shaw*, 22 Wash. 234 (60 Pac. 406); *Chamberlin v. Winn*, 1 Wash. 502; *Fredericks v. Tracy*, 33 Pac. 750; 2 Pomeroy, Remedies (2d ed.), § 678.

While it is true, as a general rule, that parol evidence is inadmissible to contradict the terms of a written con-

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tract, it is consistent with the weight of modern authority to show that, at the time a written contract is made, a supplemental oral agreement was entered into between the parties to show how, and in what manner, payments were to be made under the contract; and this is true even though the express terms of payment are stated in the written contract. *Buchanon v. Adams*, 49 N. J. Law, 636 (60 Am. Rep. 666); *Lynch v. Henry*, 44 N. W. 837; *Kane v. Cortesy*, 100 N. Y. 132; *Thomas v. Loose*, 114 Pa. St. 35; *Kullmans v. Lindsay*, 114 Pa. St. 166; *Edwalt v. Farlow*, 62 Iowa, 212; *Delaney v. Linder*, 22 Neb. 274; *Paul v. Owings*, 32 Md. 402; *Marsh v. Bellew*, 45 Wis. 36; *Phillips v. Preston*, 5 How. 278 (12 L. ed. 152); *Carr v. Dooley*, 119 Mass. 294; 2 Jones, Evidence, § 507; *Browne*, Parol Evidence, pp. 128, 129.

The opinion of the court was delivered by

MOUNT, J.—This action was brought to recover possession of a piano and for damages for its unlawful detention. The complaint alleges, in substance, that the appellant had agreed to sell and had delivered to respondents the piano in question, under a written contract in the nature of a conditional sale, which contract provided that, in case the respondents failed to make any of the payments at the time agreed upon, or should remove or attempt to remove or sell said instrument, then the appellant might retake the same wherever found; and, further, that respondents had failed to make the payments agreed upon and had, without the consent of the appellant, removed said instrument from Wallace, Idaho, where the contract was made, to Spokane, Washington; that appellant, before bringing the action, demanded possession of the respondents, which demand was refused. The respondents, after admitting the contract and re-

moval and payments alleged, denied generally the other allegations of the complaint and alleged affirmatively that, by a contemporaneous oral contract, payments were to be made, not in money, as provided in the contract, but in commissions for the sale of other instruments, and that by the terms of this oral contract all payments to be made upon the written contract had been made; and also alleged, by way of counterclaim, that, subsequent to the written contract, respondents had, at the request of appellant, rendered services to the appellant, the reasonable value of which more than offset the purchase price of the piano sued for. When the action was brought, appellant took possession of said piano under the statute, and had the same at the time of the trial. On the trial the jury found for the respondents. From the judgment rendered upon the verdict, plaintiff appeals.

Numerous errors are assigned in appellant's brief, which for convenience here are grouped under three classes: (1) That the verdict is not supported by, and is contrary to, the evidence; (2) that the court erred in permitting respondent's counsel, upon cross-examination of witnesses, to ask certain questions; (3) that the court erred in its instructions to the jury. Upon the first class of errors we find ample evidence in the record to support the verdict of the jury. It is a settled rule that this court will not disturb verdicts where the question of fact is properly submitted to the jury, even although this court may believe the facts to be otherwise than as found by the jury. *Swadling v. Barneson*, 21 Wash. 699 (59 Pac. 506).

Second. While some of the questions asked upon cross-examination by respondents' counsel were undoubtedly open to criticism, we are of the opinion that the

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court below did not abuse its discretion in this regard, and that no reversible error was committed.

Third. The principal contention in this case arises upon the instruction of the court to the jury, wherein the court instructed the jury as follows:

“The real issue is, Was there any money due on the piano at the time it was taken? You are judges of the credibility of the witnesses. If you find that any witness has wilfully testified falsely, in regard to any material fact, you are at liberty to disregard his testimony entirely, except when corroborated. The burden of proof is on the plaintiff, to show at the time it was taken that anything was due on the piano, and should show that fact by a preponderance of the testimony. Preponderance of the testimony is the convincing proof; if the evidence is clearly balanced on all the facts as to the payments claimed by defendants, you should find for the defendants.”

It is urged by appellant that this instruction is erroneous, because the action is founded upon a failure to pay money which the respondents have promised and agreed to pay, and when the respondents claimed to have made payment this is new matter, and must be set up as an affirmative defense; that is to say, the burden of proof is on the respondents to show such payment. This rule urged by appellant for application here is certainly correct in actions upon promissory notes, and where the action is founded upon a failure to pay money and the like, but is not applicable in an action for replevin or claim and delivery, as in the case at bar. In cases of this character, it devolves upon the plaintiff to prove ownership, which in this case depended upon the fact whether the defendants had failed to pay for the piano or not. Under a general denial, the defendants would have been permitted to have shown that they had fully paid for the instru-

ment in question, and the plea of payment here neither abridged nor enlarged their right of proof in that regard, nor placed the plaintiff in any different position from that in which a general denial would have placed him. The onus is upon the plaintiff to prove title in himself, and this was the real issue in the case. The plea of payment was, in effect, a plea of property in the defendants. Under such a plea, the burden is upon the plaintiff to show his title. Cobbey, Replevin, §§ 1003, 1005, 1006, 1036, 1040.

It is also urged that the contemporaneous oral agreement above referred to is one upon which no evidence could have been received, because it contradicted the terms of the written contract. This oral agreement was not a contradiction of the terms of the written contract, and did not vary that contract except in the manner of payment, and this can be shown. It is also competent to show that the parties, either at the same time or subsequently, upon a new consideration, agreed how the payments provided for in the original contract might be made, either in money or money's worth, and this is not such a variance as is contemplated by the general rule here announced. 1 Greenleaf, Evidence (15th ed.), 303; *Weeks v. Medler*, 20 Kan. 57.

The other instructions complained of substantially state the law as applied to this case.

We find no reversible error, and the judgment will therefore be affirmed.

REAVIS, C. J., and DUNBAR, FULLERTON and ANDERS, JJ., concur.

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Syllabus.

[No. 3583. Decided February 9, 1901.]

JOHN I. FITCH *et al.*, Respondents, v. LEH W. APPLGATE *et al.*, Appellants.

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LABORER'S LIEN — ENFORCEMENT — JOINDER OF SEPARATE CLAIMANTS.

The joinder as parties plaintiff of persons seeking to foreclose liens for labor given by Laws 1897, p. 55, is proper, since the act provides for the enforcement of the liens in the same manner as mechanics' liens, and the statute (Bal. Code, § 5910) governing in such cases requires the joinder of all lien claimants as parties plaintiff or defendant in any action for the foreclosure of their liens.

SAME — PLEADING — SUFFICIENCY OF COMPLAINT — REFERENCE TO EXHIBITS.

A complaint for the foreclosure of a laborer's lien sufficiently sets forth facts constituting a cause of action, when, although not incorporating the terms and conditions of the lienor's contract in the body of the complaint, it makes express reference to an exhibit attached to the complaint, in which is set forth a statement of such terms and conditions.

SAME — ATTORNEY'S FEES.

The allowance of an attorney's fee to a lien claimant upon a decree of foreclosure in his favor of a laborer's lien is proper, under the terms of the act providing for the enforcement of such liens in the same manner as mechanics' liens are enforced.

SAME — NOTICE OF LIEN — SUFFICIENCY OF STATEMENT.

Under a statute giving a lien for labor performed "in the operation of any railway, canal or transportation company, or any water, mining or manufacturing company, sawmill, lumber or timber company," a notice of lien is sufficient, which states that the lien is for labor performed by the claimant at the instance and request of the employer, without particularizing what the claimant was employed to do or what he did do.

SAME — CONSTITUTIONAL LAW — CLASS LEGISLATION.

A law giving laborers in certain enumerated industries liens for labor performed does not constitute special or class legislation in violation of § 12, art. 1, of the constitution, where the law is uniform in its operation and all who are included therein are treated alike.

SAME — STATUTES — CONSTRUCTION.

Laws 1897, p. 55, § 1, which provides that every person performing labor in the operation of any railway, canal, transportation, water, mining, manufacturing, sawmill, lumber or timber company shall have a prior lien on the franchise, earnings, and on all the real and personal property of said company, to the extent of the moneys due him for labor performed within six months next preceding the filing of his claim therefor, and no mortgage, deed of trust or conveyance shall defeat or take precedence over said lien, must be construed as merely intended to extend the period for which liens were allowed by a prior statute, and not as intended to give such liens priority over mortgages antecedently executed and recorded, in the absence of language clearly expressing the legislative intent to make such a radical provision.

MORTGAGES — MERGER.

There is no merger of a mortgage as against subsequent incumbrances, when the mortgagor conveys the land to the mortgagee, where it would be inequitable, or where there is an express agreement of the parties that the lien shall remain intact.

Appeal from Superior Court, Pierce County.—Hon. JAMES A. WILLIAMSON, Judge. Reversed.

Stiles & Nash, for appellants:

Upon the assignment that the court erred in denying defendants' motion to require plaintiffs' causes of action to be separately stated, counsel cite *Rialto M. & M. Co. v. Lowell*, 23 Colo. 253.

The act gives a lien to persons "performing labor," but it by no means follows that persons who perform services perform labor within the meaning of this law. Many courts have had occasion to construe this word "labor," when found in similar statutes, and all are agreed that one who labors, in such statutes, means one who toils manually. *State ex rel. Peck v. Rusk*, 55 Wis. 465; *Pennsylvania & D. R. R. Co. v. Leuffer*, 84 Pa. St. 168

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Argument of Counsel.

(24 Am. Rep. 189); *Hinton v. Goode*, 73 Ga. 233; *Donnelly v. Johnes*, 44 Atl. 180; *Ricks v. Redwine*, 73 Ga. 273. The rule that mechanic's lien statutes are to be liberally construed does not extend to the determination of what persons are entitled to liens thereunder, as to which matter a statute cannot be extended by construction. *Nanz v. Cumberland Gap Park Co.*, 52 S. W. 999 (76 Am. St. Rep. 650, 47 L. R. A. 273).

The act is void because it grants special privileges to certain persons, and lays special burdens upon others, and is purely "class legislation," wherein it violates both the state and federal constitutions. *Lippman v. People*, 175 Ill. 101; *Sutton v. State*, 96 Tenn. 696 (33 L. R. A. 589); *In re Morgan*, 58 Pac. 1071 (77 Am. St. Rep. 269, 47 L. R. A. 52); *Johnson v. Goodyear Mining Co.*, 59 Pac. 304 (78 Am. St. Rep. 17, 47 L. R. A. 338); *Tacoma v. Krech*, 15 Wash. 296 (34 L. R. A. 68); *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150 (41 L. ed. 666); *Luman v. Hitchens Bros. Co.*, 44 Atl. 1051 (46 L. R. A. 393); *In re Jacobs*, 98 N. Y. 98 (50 Am. Rep. 636); *State v. Goodwill*, 33 W. Va. 179 (25 Am. St. Rep. 863, 6 L. R. A. 621).

The act is void wherein it undertakes to make a laborer's lien take precedence of an antecedent incumbrance on real property, because it takes such property without due process of law. *Croskey v. Northwestern Mfg. Co.*, 48 Ill. 481; *Getchell v. Allen*, 34 Iowa, 559; *Equitable Life Ins. Co. v. Slye*, 45 Iowa, 618; *Dennis v. Moses*, 18 Wash. 537 (40 L. R. A. 302). It has been the invariable policy of our laws to protect prior incumbrances, in all kinds of cases where liens are provided for. *Home Savings & Loan Association v. Burton*, 20 Wash. 688 (56 Pac. 940).

A statute providing for the allowance of attorney fees

on the foreclosure of laborers' statutory liens is unconstitutional. *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150 (41 L. ed. 666); *Los Angeles Gold Mine Co. v. Campbell*, 56 Pac. 246.

F. S. Blattner, for respondents:

If several distinct liens are united in one complaint and there is a distinct statement of the facts as to each lien, there is a sufficient separate statement of each cause of action, though they are not numbered or otherwise formally designated. *Booth v. Pendola*, 88 Cal. 36 (23 Pac. 200).

Where the bill of particulars, when taken in connection with the statement of the petition, gives as full information of the petitioner's claim as if a specific statement of everything were fully set out, it has been held sufficient. *McLaughlin v. Shaughnessey*, 42 Miss. 520.

The language of the statute is anyone performing labor in the "operation" of a mill. Certainly a manager of a mill performs labor in the operation of it as much as the engineer who controls the machinery, the carrier who operates the carriage upon which the logs are carried to the saw, or the man who wheels away saw dust. *Stryker v. Cassidy*, 76 N. Y. 50 (32 Am. Rep. 262).

The act is not special. All persons brought under its influence are treated alike. So long as its provisions apply to all persons under substantially like circumstances, it is not an arbitrary exercise of power. *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205 (32 L. ed. 107, 8 Sup. Ct. 1163); *Minneapolis & St. L. Ry. Co. v. Herrick*, 127 U. S. 210 (32 L. ed. 109, 8 Sup. Ct. 1176); *Farmers' L. & T. Co. v. Kansas City, etc., R. R. Co.*, 53 Fed. 182, 193; *Jones v. Brim*, 165 U. S. 180 (41 L. ed. 677);

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Holden v. Hardy, 37 L. R. A. 103 (46 Pac. 756); *Magoon v. Illinois T. & S. B.*, 170 U. S. 283 (42 L. ed. 1037); *Orient Ins. Co. v. Daggs*, 172 U. S. 577 (43 L. ed. 552).

Upon the point that the statute is valid in giving laborers' liens priority over antecedent mortgages, counsel cites *Georgia, etc., Banking Co. v. Dunlop*, 33 S. E. 882; *Atlantic Dynamite Co. v. Ropes Gold & Silver Co.*, 77 N. W. 938; *Sitton v. Dubois*, 14 Wash. 624; *Gilchrist v. Helena, etc., Co.*, 58 Fed. 709; *Virginia Development Co. v. Crozier Iron Co.*, 17 S. E. 806 (44 Am. St. Rep. 893).

The opinion of the court was delivered by

DUNBAR, J.—This action was brought under the act of March 6, 1897 (Laws 1897, p. 55), to foreclose eight laborers' liens upon a saw mill and the land on which it stood. Applegate and wife were the owners of the land described in the complaint, and the defendants Caesar and wife were the assignees of certain mortgages upon the land described, which mortgages were made to other parties to secure liens by which money was obtained by Applegate and wife, and were recorded prior to the time of the commencement of the work for which the liens were filed, and which had been assigned to Caesar and wife before the commencement of this action. Caesar and wife were brought in as defendants for the purpose of settling their rights. Upon the trial of the cause, judgment was given for the plaintiffs for the amount demanded, and it was adjudged that the rights of the lienors took precedence over the liens of the mortgages which Caesar and wife owned. From this judgment an appeal is taken.

A demurrer was interposed to the complaint and over-

ruled. Applegate and wife did not further appear in the case. Motion was made by the defendants to require the complainants' causes of action to be stated separately, which motion was overruled, and the action of the court in that respect is assigned as error. We think this motion was properly overruled. The law provides that liens of this kind shall be foreclosed in the same manner as mechanics' liens; and § 5910 of Bal. Code provides that any number of lien claimants who have legally filed claims of liens against the same property, or any part thereof, shall be joined as parties, either plaintiff or defendant. If the complaint was so indefinite that the defendants could not properly plead to it, they should have interposed a motion to make it more definite and certain. The complaint stated a cause of action.

It is objected that the statement of the terms and conditions of the contract was not incorporated in the first part of the complaint, and that the law allowing exhibits to be referred to extends only to documents, instruments, and the like; but the statement of the terms and conditions in this case is not an exhibit in that sense. The contract is set forth in paragraph one of the complaint. The statement that the lien is for labor performed by the said claimants at the instance and request of the Applegates, who were, at the time of said request and at the time of the performance of said labor, the owners of said real estate and the saw mill situated thereon, and that the Applegates conducted said business under a certain name, and the particulars of the employment and of the labor, are set forth in the statement of terms and conditions, and, by express language, made a part of the complaint. The object of the Code is to simplify the old common-law practice of pleading, and the law provides that the complaint shall be sufficient if it states the title of the

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cause, the name of the court, the venue, the parties to the action, a plain and concise statement of the facts constituting the cause of action, and a demand for relief. These requirements are all met by this complaint. There is no question but that the defendants were fairly apprised of the relief which was sought by these plaintiffs, and of the facts upon which the demand for relief was based. This, under the Code, is the test of the sufficiency of the complaint.

On the question of attorney's fees we are content with the rule announced in *Ivatt v. Willis*, 17 Wash. 645 (50 Pac. 467), and *Griffith v. Maxwell*, 20 Wash. 403 (55 Pac. 571), and think it applies to this kind of a lien.

We also think that the lien notices were sufficient under the law. *Overbeck v. Calligan*, 6 Wash. 342 (33 Pac. 825).

It is urged that this law falls under the ban of § 12, art. 1, of the state constitution, which provides that "no law shall be passed granting to any citizens, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." We do not think this criticism is deserved. Laws are uniformly upheld where all persons, even though they may constitute a class, who fall under the operations of the law, are treated alike. We held in *Redford v. Spokane Street Ry. Co.*, 15 Wash. 419 (46 Pac. 650), that where a law is uniform in its operations, in so far as it operates at all, its constitutionality is not affected by the number of persons within the scope of its operation. Mr. Cooley in his work on *Constitutional Limitations* (5th ed.) p. 482, *p. 390, thus tersely states the rule, under the title of "Unequal and Partial Legislation":

"These discriminations are made constantly; and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle. The legislature may also deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties, and capacities of citizens. The business of common carriers, for instance, or of bankers, may require special statutory regulations for the general benefit, and it may be matter of public policy to give laborers in one business a specific lien for their wages, when it would be impracticable or impolitic to do the same for persons engaged in some other employments. If the laws be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge."

Without further traversing the arguments or position of the appellants, we think that the complaints were sufficient and the statute a legal enactment.

But we come now to appellant Caesar's affirmative defense, viz., that he was the owner of mortgages and other liens which had been executed and recorded prior to six months preceding the filing of these liens. It is the contention of the respondents, and evidently was the theory entertained by the court, that the law of 1897 was intended to give liens filed in accordance with its provisions a right of priority over mortgages which had been executed and recorded prior to the time of the commencement of the work for which the liens were filed. We do not so construe this statute. Section 1 of the act (Laws 1897, p. 55), is as follows:

"Every person performing labor for any person, company or corporation, in the operation of any railway, canal or transportation company, or any water, mining

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or manufacturing company, saw mill, lumber or timber company, shall have a prior lien on the franchise, earnings, and on all the real and personal property of said person, company or corporation, which is used in the operation of its business, to the extent of the moneys due him from such person, company or corporation, operating said franchise or business, for labor performed within six months next preceding the filing of his claim therefor, as hereinafter provided; and no mortgage, deed of trust or conveyance shall defeat or take precedence over said lien."

It seems to us that the legislative intention was simply to extend the time of the lien from the time which was allowed by the old law to six months as provided in the new, and to make certain the rights of laborers in that respect,—a more liberal provision, so far as the laborer is concerned, but not differing in principle from the previous law. It is true that the language is "no mortgage, deed of trust or conveyance"; but we think that the intention of the law makers will not be reached by giving a literal interpretation to the language used, and that, if it had been the intention of the legislature to have made an extraordinary provision, as this would be, if so construed, it would have used language more clearly expressing such intention. It will be observed that a mortgage, under the provisions of this law, is placed in the same category as a conveyance; and certainly the legislature did not intend to provide that one could not convey or deed his land without subjecting it to these possible incumbrances. With this view of the law, it is not necessary to enter into a discussion of the power or want of power of the legislature to pass such a statute. This holding will reverse the judgment of the lower court, so far as it applies to Caesar and wife.

It is urged by the respondents that, when Caesar took

from Applegate a deed for the land in question and in payment of the claims for which the securities were given, the securities merged and the lien was lost. The record, however, shows that it was the express intention, by agreement between Caesar and Applegate, that the lien should remain intact; and the law is well settled that there is no merger of the mortgage, when the mortgagor conveys to the mortgagee, as against subsequent incumbrancers, where it would be inequitable, or where the intention of the parties was otherwise. *Hitchcock v. Nixon*, 16 Wash. 281 (47 Pac. 412); *Nommenson v. Angle*, 17 Wash. 394 (49 Pac. 484); *Stewart v. Eaton*, 20 Wash. 378 (55 Pac. 314).

The judgment will therefore be reversed, and the cause remanded with instructions to the lower court to enter judgment in accordance with this opinion.

REAVIS, C. J. and FULLERTON, J., concur.

MOUNT, J., not sitting.

[No. 3560. Decided February 13, 1901.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES
W. POWER, *Appellant*.

CRIMINAL LAW — MANSLAUGHTER — SUFFICIENCY OF INFORMATION —
ALLEGATIONS SETTING UP CRIMINAL ABORTION.

Under Bal. Code, § 7042, which provides that every person who shall unlawfully kill any human being without malice, involuntarily, but in the commission of some unlawful act, shall be deemed guilty of manslaughter, an information charging manslaughter is sufficient thereunder, although it sets up facts constituting the offense of producing a miscarriage, the punishment for which is provided in Bal. Code, § 7068, when such facts are pleaded only for the purpose of charging the killing as having been done in the commission of a prohibited offense and there

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is no punishment provided in the statute against producing miscarriages where death results from the commission of such acts.

SAME — EVIDENCE — DECLARATION AS RES GESTAE.

In a prosecution for causing death by producing a miscarriage, declarations of the deceased, while preparing to leave home, that she was in trouble and was going to another city to be treated by defendant, are admissible in evidence as verbal acts, explanatory of what she was doing and of her purpose, and as part of the *res gestae* of one portion of the entire transaction, when restricted by the court as competent only to explain the purpose of the deceased in leaving home, and as characterizing her act of going, and explanatory of the nature, character and object of that act.

EVIDENCE — DYING DECLARATIONS — IN EXTREMIS.

The fact that dying declarations were made two days prior to the death of the person making them would not render the declarations inadmissible in evidence, since the rule requiring it to be shown that the declarations were made while the declarant was *in extremis* does not require that the declarant be actually breathing her last, when making them, but the rule is satisfied where it is shown that the declarant died in the course of the illness from which she was suffering at the time they were made, and that the illness from which she was suffering was the direct and proximate result of the original injury which the declarations tend to illustrate.

SAME — SENSE OF IMPENDING DEATH.

Dying declarations are admissible in evidence when the court is satisfied from all the facts and circumstances shown that they were made under the sense of impending death, notwithstanding declarant may not have said in specific terms that she was without hope of recovery, or was dying, or going to die, or could not live any longer.

NEW TRIAL — NEWLY DISCOVERED EVIDENCE — DILIGENCE.

A defendant convicted of manslaughter as the result of an abortion procured by him was properly denied a new trial on the ground of newly-discovered evidence, because of lack of reasonable diligence on his part in procuring the evidence earlier, when it appeared that the newly-discovered evidence was that of a nurse whom defendant had employed to care for the deceased, that he had been at liberty all the time prior to trial and knew the

whereabouts of the nurse, but had never sought and questioned her as to her knowledge concerning matters that would be subject to inquiry at his trial.

CRIMINAL LAW — INSTRUCTIONS — LIABILITY OF PHYSICIANS FOR GROSS NEGLIGENCE.

In a prosecution for manslaughter as the result of a criminal abortion, where the evidence tends to show that the physician had neglected to take proper sanitary precautions in the care of the deceased, a charge to the jury that "when a physician undertakes to attend a sick person, the law imposes upon him the duty of directing the sanitary conditions surrounding the patient, of prescribing the proper medicines and the times and manner of taking, and whatever other appliances and operations necessary to the restoration of health," is applicable to one phase of the case, but does not undertake to define the degree of care and skill required of a physician; and such charge is not misleading when the instructions elsewhere charge the jury as to the criminal liability of a physician for wilful and felonious neglect of a patient.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

S. G. Allen and Sullivan, Nuzum & Nuzum, for appellant.

James Z. Moore, Prosecuting Attorney; *Miles Poindexter* and *Horace Kimball*, for the State.

The opinion of the court was delivered by

FULLERTON, J.—The appellant was convicted of the crime of manslaughter. The charging part of the information on which he was tried is as follows:

"That the said defendant, Charles W. Power, in the county of Spokane, state of Washington, on or about the fifth (5th) day of December, eighteen hundred and ninety-eight (1898), did unlawfully, wilfully, and feloniously employ an instrument, a more particular description whereof is to this informant unknown, in and upon the person of one Cora Reinhart, the said Cora

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Reinhart then and there being a pregnant woman, whom he, the said Charles W. Power, did then and there suppose to be pregnant, with the intent and on purpose thereby to procure a miscarriage of the said Cora Reinhart, the same being then and there not necessary to preserve the life of the said Cora Reinhart, and did then and there as aforesaid, by the means aforesaid, produce a miscarriage upon the person of the said Cora Reinhart, the said defendant, Charles W. Power, then and there being a physician and surgeon practicing his profession as such in the county and state aforesaid; the said Cora Reinhart being then and there, from and including the said fifth (5th) day of December, 1898, to the seventeenth (17th) day of December, 1898, continuously under the sole care and custody of the said Charles W. Power and in the relation of patient to the said Charles W. Power; and the said Charles W. Power, during the entire period aforesaid, occupied the relation of physician and surgeon to the said Cora Reinhart. And he, the said Charles W. Power, did then and there, during the period aforesaid, as such physician and surgeon, wilfully, feloniously, and unlawfully neglect the said Cora Reinhart, and did then and there wilfully, feloniously, and negligently cause the person of the said Cora Reinhart to become, and did allow the same to remain, externally filthy and covered with vile and poisonous substances, and internally poisoned and inflamed and filled with poisonous and filthy matter and discharges, and did then and there unlawfully, wilfully, and feloniously neglect, fail, and refuse to cleanse the person of the said Cora Reinhart, or to remove therefrom the poisonous discharges aforesaid, and during the entire period aforesaid did unlawfully, wilfully, feloniously, and negligently place, keep, and allow to remain the person of the said Cora Reinhart in an offensive and unclean bed, and in offensive and unclean clothes, and in a filthy room, filled with vile, unhealthy, and poisonous atmosphere, and said room, clothes, and bed and the person of the said Cora Reinhart then and there being filthy, vile, and poisonous as aforesaid, by, through, and on account of the aforesaid neglect of the said Charles

W. Power, and the aforesaid miscarriage, unlawfully and feloniously produced upon the person of the said Cora Reinhart by the said Charles W. Power as aforesaid, and by the acts and things aforesaid, the said Charles W. Power did then and there unlawfully and feloniously inflict upon the person of the said Cora Reinhart certain mortal injuries, the same being the acts and things aforesaid, by and on account of which said mortal injuries, the same being the unlawful acts of the said Charles W. Power, the said Cora Reinhart, in the county and state aforesaid, on or about the seventeenth (17th) day of December, 1898, died.

Wherefore, this informant herewith informs and charges that the said Charles W. Power, in the county and state aforesaid, on or about the said seventeenth (17th) day of December, eighteen hundred and ninety-eight (1898), did unlawfully and feloniously slay and kill the said Cora Reinhart, then and there a human being, involuntarily, but in the commission of the unlawful acts of the said defendant aforesaid, thereby committing the crime of manslaughter, contrary to the statute in such case made and provided."

The information was founded upon § 7042 of the statute (Ballinger's), which provides:

"Every person who shall unlawfully kill any human being without malice, express or implied, either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act, shall be deemed guilty of manslaughter."

Another section of the statute (§ 7068, Id.) makes it an offense for any person to administer to any pregnant woman whom he supposes to be pregnant, any medicine, drug or substance whatever, or to use or employ any instrument or other means on her person, "thereby to procure the miscarriage of such woman," unless the same is necessary to preserve her life. It is first contended that the trial court erred in refusing to sustain

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a demurrer to the information. The appellant calls our attention to the sections of the statute above cited, and argues therefrom that, inasmuch as the latter makes it a substantive offense, punishable as such, for any person to administer drugs to, or use instruments upon, a pregnant woman for the purpose of procuring her miscarriage, such acts must be punished in the way the statute points out, under an indictment or information charging one or more of these specific acts alone, and cannot, therefore, be the unlawful acts which were intended to be included within the statute defining the crime of involuntary manslaughter. We cannot think this contention sound. The statute, it will be noticed, prescribes a punishment for doing these specific acts, without regard to the effect such acts may have had upon the person operated upon. The crime is completed when the prohibited acts are committed, and their effect is not made a material inquiry. Had the statute gone farther and made a death resulting from them a substantive offense, to be punished in the manner therein prescribed, it might be contended with some force that a person committing the acts causing the death would have to be informed against under the statute and punished as the statute directs. But as the legislature has made the acts punishable as acts, without reference to their consequences, we cannot think it was intended to exempt a person causing the death of another by these means from being informed against and punished under the general statutes relating to unlawful homicides.

It is next contended that the court erred in admitting certain testimony. It appeared that the deceased resided near Rathdrum, in the state of Idaho, and that immediately preceding the time of her meeting with the defendant she left her home and went to Spokane, where

the defendant resided; that while preparing for her journey she had a conversation with her sister relative to the purpose of her going. The sister was examined as a witness on behalf of the state, in the course of which she was asked the following question: "I will ask you if your sister, Cora Reinhart, made any statement to you at the time she was in the act of going and preparing to go to Spokane from Rathdrum, where she was going, and her purpose in going." This was objected to by the appellant as incompetent, irrelevant and immaterial. The court overruled the objection, and the witness answered: "She said she was in trouble, and was going to Spokane to be treated by Dr. Power." It is urged here that this testimony was hearsay, not part of the *res gestae*, and highly prejudicial to the defendant. The learned trial judge did not admit the testimony generally, nor as part of the *res gestae* of the main transaction. When ruling upon the objection he distinctly and clearly stated in the presence of the jury that it was competent only to explain the purpose of the deceased in leaving home, and as characterizing her act of going, and that he admitted it as explanatory of the nature, character and object of that act. As thus limited, we think the evidence was properly admitted. It was certainly competent for the state to prove that the defendant left her home to go to Spokane, and that she there sought the defendant and placed herself under his treatment. The preparation she made for going, her condition of health at that time, and her conduct and demeanor, were likewise matters properly admissible in evidence, as a part of the history of the case and necessary to its general understanding. On the same principle, her declarations made at the time she was preparing for the journey could be shown. They were in the nature of verbal acts, explanatory of what

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she was doing and of her object and purpose, and are part of the *res gestae* of this particular part of the entire transaction. The authorities generally hold declarations of this character admissible. In *Greenleaf on Evidence*, § 108, it is said:

“Where a person . . . leaves his home, . . . his declarations, made at the time of the transaction, and expressive of its character, motive or object, are regarded as ‘verbal acts, indicating a present purpose and intention,’ and are therefore admitted in proof like any other material facts.”

In the case of *State v. Dickinson*, 41 Wis. 299, the defendant was tried for the crime of having murdered Jenny Everson in the commission of an abortion. One Mary Erickson was called as a witness, and, over the objection of the defendant, was permitted to testify to certain conversations had with the deceased immediately preceding the time the deceased left the place where they were stopping, as to where she was going and for what purpose. In these conversations the deceased stated to the witness that she (the deceased) was in a family way, that she had been to see the defendant about it, that she was going to the defendant to get medicine and a syringe, and that she had engaged with the defendant to return to his place on a subsequent day for the purpose of having instruments used to get rid of the child. The trial court instructed the jury that they might consider these declarations as evidence tending to prove the fact that the deceased had at that time the intention of having an abortion produced upon her, but that it was not evidence that the defendant had actually produced the abortion, or had engaged to do it. It was held that to admit the evidence with this restriction was not error, the court saying:

“The first inquiry is, whether the declarations of de-

ceased to Mary Erickson were admissible for the purpose of showing her intention, and as their scope and effect were restricted by the court. We are of the opinion that they were. They constituted a part of the *res gestae*, were contemporaneous with the main fact under consideration, and were so connected with it as to illustrate its character. 1 Greenl. Ev., § 108. It was certainly competent to prove that the deceased went to the house of the defendant at the time it was charged in the information the abortion was produced. Upon the authorities, her intent or purpose in going there might be shown by her declarations then made or previously made; because such declarations became a part of the *res gestae*. For it is evident the declarations were connected with the act of her going to the defendant; were expressive of the character, motive or object of her conduct; and they are to be regarded 'as verbal acts indicating a present purpose or intention, and therefore are admitted in proof like any other material facts.'"

In *State v. Howard*, 32 Vt. 380, the defendant was indicted for attempting to procure the miscarriage of one Olive Ashe, in consequence of which she died. On the trial it was shown that the deceased, in company with her sister, left home and started for a neighboring town, near where the respondent resided. "The government asked the witness what was the purpose of their thus leaving home, as understood between them at the time of leaving." The trial court overruled the objection of the defendant to the question, after which the witness answered: "I had some talk of going on a visit before I knew she was going. I and she supposed her to be pregnant, and she left Sutton to get an abortion procured, as was understood between us at the time we left." It was held that the evidence was properly admitted, the court saying:

"The declarations of Olive Ashe, as to the purpose of the journey in going to the respondent's, were properly

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admitted as part of the *res gestae*. The mere act of going was equivocal; it might have been for professional advice and assistance. The declarations were of the same force as the act of going, and were admissible as part of the act."

See, also, *State v. Winner*, 17 Kan. 298; *Solander v. People*, 2 Colo. 48; *Cluverius v. Commonwealth*, 81 Va. 787; *Thomas v. State*, 67 Ga. 460; *State v. Peffers*, 80 Iowa, 580 (46 N. W. 662); *United States v. Nardello*, 4 Mackey, 503; *Harris v. State*, 96 Ala. 24 (11 South. 255); *Tilley v. Commonwealth*, 89 Va. 136 (15 S. E. 526).

The state, over the objection of the defendant, was allowed to introduce statements made by the deceased some two days previous to her death, as dying declarations. Prior to the admission of these declarations the witness was searchingly and minutely examined as to the condition of the deceased at the time and the circumstances under which they were made, not only by the counsel for the state and the defendant, but by the trial judge himself. The examination covers many pages of the record, and only a brief outline of it can be given here. Describing the condition of the deceased, the witness stated that she was very weak and in great agony; that she had no strength and had to be lifted from one side of the bed to the other; that her "hands felt terribly, . . . a clammy feeling," and that she never rallied after the conversation, but gradually grew worse until her death. Testifying as to the circumstances, the witness stated that she (the witness) had been for some time trying to get from the deceased the cause of her illness; that the deceased had previously refused to tell her, not only anything concerning the cause of her illness, but even her name; and that just preceding the conversation

in which the declarations were made the deceased called her to her bedside, took hold of her hands and made the statements. The witness further testified that in the course of this conversation the deceased said that she knew she couldn't last long unless there was something done for her; that she didn't think she would ever be taken out of the room where she was lying until she was packed out; that she could feel her strength leaving her rapidly. That when the witness tried to encourage her, telling her that she must live in hopes, the deceased answered that she had lived in hopes long enough; that "she had given up all hopes." On being examined by the defendant's counsel the witness further stated that the deceased did not say that she "believed she was going to die," or that "she could not live any longer," or use words to express her belief of her approaching death, other than those above quoted. It was not contended that there was anything in the declarations themselves which would render them inadmissible. The objection is, that it was not shown that they were made while the declarant was *in extremis*, or while she was under the consciousness of impending death. The first part of the objection is directed against the time elapsing between the making of the declarations and the declarant's death. But, while this was an element proper and necessary to be considered in determining the admissibility of the declarations, it was not of itself sufficient to require their exclusion. The rule requiring it to be shown that the declarations were made while the declarant was *in extremis* does not require that it be shown that they were made while the declarant was literally breathing her last. The rule is satisfied when it is shown that the declarant died in the course of the illness from which she was suffering at the time they were made, and that the illness from which

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she was suffering was the direct and proximate result of the original injury which the declarations tend to illustrate. See the cases collected in 10 Am. & Eng. Enc. Law (2d ed.), p. 369, note 4. As to the second part of the objection, it is true it was not shown that the declarant said, in so many words, that she believed she was going to die, or that she could not live longer, but this was not necessary. The question to be determined here is, was the trial court justified in believing, from the nature of the evidence, that the declarant believed she was about to die, and was without hope or expectation of recovery? This conclusion must be drawn from the entire statement and the conditions surrounding the declarant, and not from any specific words she may have used. Without again recurring to the record, we think the statements and circumstances shown, justified the trial court in the conclusion that the declarant in this case believed she was about to die, and that from her all hope of recovery had departed. It was not error, therefore, for the court to admit the declaration in evidence.

It is next objected that the court erred in refusing to grant the appellant's motion for a new trial. This motion was based on the ground of newly-discovered evidence. This consists of the statement, shown by the affidavit of a nurse, to the effect that the deceased, immediately preceding her death, had made declarations to the nurse tending to exonerate the appellant. It appears from the record that the nurse was employed to wait upon the deceased by the defendant himself; and, while he states in his affidavit that he had no knowledge at the time of the trial that she would testify that the deceased had made these declarations, it would be too much to say that he could not, by reasonable diligence, have discovered that fact. He was at all times, prior to his con-

viction, at liberty on bail, and had every opportunity to prepare for his defense. He knew the whereabouts of the nurse, yet it appears that she was never questioned as to her knowledge concerning the matters that would be subject to inquiry at the trial. This was not the exercise of that reasonable diligence which the Code requires as a prerequisite to the granting of a new trial on this ground.

Finally, it is urged that the court erred in giving the jury the following instruction:

“When a physician undertakes to attend a sick person, the law imposes upon him the duty of directing the sanitary conditions surrounding the patient, of prescribing the proper medicines and the times and manner of taking, and whatever other appliances and operations necessary to the restoration of health. As to the question whether or not the deceased was improperly treated in these respects, you are to find from all the evidence in the case; and if you have a reasonable doubt from the evidence as to whether or not the deceased was improperly treated in these respects, then you must find the defendant not guilty.”

It is objected that this is not a correct statement of the law, in that it virtually tells the jury that any neglect or improper treatment of the deceased, if they found it to exist, would be sufficient to convict the defendant, while the law is that a physician is not criminally liable unless he is guilty of gross want of skill or attention. But it will be noticed that the court did not, in this instruction, undertake to define the degree of care and skill required of a physician. This was done in the preceding instruction, and, while it is true that the word “gross” was not used, yet the jury were told that they could not find the defendant guilty unless they found that his neglect was willful and felonious. The charge, as a whole, was

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a clear and concise statement of the law applicable to the case, and could not have misled the jury.

The judgment is affirmed.

REAVIS, C. J., and DUNBAR and ANDERS, JJ., concur.

[No. 3109. Decided February 15, 1901.]

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30	176
30	219

SARAH A. RAUGHT *et al.*, Plaintiffs, v. F. B. LEWIS *et al.*,
Defendants; ABRAM H. HYATT *et al.*, Appellants, v.

W. A. LEWIS, Respondent.

JUDGMENTS — REVIVAL OF LIEN — CONSTITUTIONAL LAW.

The act of March 6, 1897 (Laws 1897, p. 52), relating to the duration of judgments and repealing the existing law which permits the renewal of judgments is unconstitutional and void as to judgments rendered prior to its passage.

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge. Reversed.

Karnes, Holmes & Krauthoff and *Cyrus Happy*, for appellants.

Lewis & Lewis, for respondent.

The opinion of the court was delivered by

ANDERS, J.—A petition was filed by appellants herein in the superior court of Spokane county in September, 1897, to revive a judgment in the case of Sarah A. Raught and C. R. Fowler *et al.*, against F. B. Lewis and W. A. Lewis *et al.*, which judgment was rendered in said court in November, 1891. A demurrer to the petition was filed by respondent herein on all of the statutory grounds. The demurrer was sustained by the lower court,

and this appeal is from the judgment rendered below, dismissing the petition and allowing costs to respondent.

The only serious question presented by the record, and the one that is considered decisive, is as to the validity of the act of March 6, 1897 (Laws 1897, p. 52), relating to the duration of judgments and repealing §§ 462 and 463, 2 Hill's Code, it being contended by respondent that said act affected judgments rendered prior to its passage. No extended discussion of this question is now necessary, this court having decided on December 6, 1900, after a careful consideration of the subject, in the case of *Palmer v. Laberee*, 23 Wash. 409 (63 Pac. 216), that the said act of March 6, 1897, was unconstitutional and void as to such judgments. In view of this decision, the demurrer cannot be sustained on this ground.

The only other question insisted upon by respondent is as to the sufficiency of the assignment attempted to be set up in the petition. While the allegation of the assignment in the petition is not as clear and distinct as it should be, we are of the opinion that the defects in the allegation were not such as could be reached by demurrer.

It is not necessary to consider the remaining grounds of demurrer, as they possess no merit.

The judgment is reversed, and the cause remanded with instructions to overrule the demurrer.

REAVIS, C. J., and DUNBAR and FULLERTON, JJ., concur.

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[No. 3729. Decided February 15, 1901.]

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THE STATE OF WASHINGTON, *Respondent*, v. FRED P.
DENGEL, *Appellant*.

ROBBERY — SUFFICIENCY OF INFORMATION — OWNERSHIP OF PROPERTY
TAKEN.

An information charging the crime of robbery is insufficient when it fails to allege ownership of the property taken in some one, other than the defendant.

SAME — CONVICTION OF LESSER OFFENSE — INSTRUCTIONS.

Under an indictment or information charging robbery, the defendant may be convicted of the lesser offense of larceny, and, where the evidence tended to show a larceny rather than a robbery, it was error for the court, upon a prosecution for robbery, to refuse to instruct on the crime of larceny as included within the charge of robbery.

Appeal from Superior Court, Yakima County.—Hon.
JOHN B. DAVIDSON, Judge. Reversed.

Graves & Englehart, for appellant.

John J. Rudkin, Prosecuting Attorney, for the State.

The opinion of the court was delivered by

REAVIS, C. J.—Defendant, together with one Cox and one Smith, was jointly informed against for robbery. The information charged the defendants jointly with robbery, committed as follows:

“That the said Fred P. Dengel, John Cox, and Annie Smith, on the 10th day of May, 1900, A. D., in the county of Yakima, state of Washington, then and there being, did then and there forcibly and feloniously take from the person of one Norman Stevens the sum of fifty-two dollars, lawful money of the United States, and of the value of fifty-two dollars, by violence and putting in fear him, the said Norman Stevens; contrary to the stat-

ute in such cases made and provided, and against the peace and dignity of the state of Washington.”

Defendant was tried separately, and declined the services of counsel until after a verdict of guilty was returned by the jury. The evidence for the state was that Stevens, while drunk and carousing in a house of ill-repute, became ill and went out into the yard in the rear of the house; and after dark, and while alone, a man whom he recognized as the defendant Dengel came up, and presented a pistol at him, and took fifty-two dollars in money from his person. No one else saw the alleged robbery. The defendant testified that he was at the house the night of the alleged robbery; that he saw Stevens sitting out in the rear of the house, in the dark, on a chair, and that Stevens was at the time drunk and unconscious; that defendant put his hand in Stevens' pocket and took out a twenty-dollar gold piece; that defendant had no pistol, and used no force in taking the money; and that Stevens made no resistance or outcry. After the verdict of guilty was returned, defendant, by counsel, moved for a new trial on the ground of errors of law occurring at the trial, and insufficiency of the evidence to justify the verdict, and that the facts stated in the information do not constitute a crime, in that the information does not allege the ownership of the money alleged to have been stolen.

1. It will be observed that no fact stated in the information negatives the ownership of the money taken from the person of Stevens in the defendant. The ownership is not alleged in another than defendant. Blackstone defines robbery as follows:

“Robbery is the felonious and forcible taking from the person of another of goods or money to any value by violence or putting in fear.”

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This is the common law definition of robbery. The statute (§ 7103, Bal. Code) reads:

“Every person who shall forcibly and feloniously take from the person of another, or from his immediate presence, any article of value, by violence or putting in fear, shall be deemed guilty of robbery,”

2 Bishop on Criminal Law (8th ed.), par. 1159, observes:

“The indictment for robbery charges a larceny, together with the aggravating manner which makes it, in the particular instance, robbery. For example, the property is described the same as in larceny; the ownership is in the same way set out, and so of the rest.”

This definition is cited with approval in *State v. Johnson*, 19 Wash. 410 (53 Pac. 667). The same author, in his work on Criminal Procedure (4th ed.), § 1006, declares that the ownership must be alleged and proved in robbery as in larceny; and the same rule has been announced under the California statute, which is substantially like the statute of this state. *People v. Vice*, 21 Cal. 345; *People v. Jones*, 53 Cal. 58; *People v. Ammerman*, 118 Cal. 23 (50 Pac. 15). And in Texas; *Smedley v. State*, 30 Tex. 214; *Barnes v. State*, 9 Tex. App. 128. In Missouri; *State v. Lawler*, 130 Mo. 366 (32 S. W. 979, 51 Am. St. Rep. 575). In Nevada; *State v. Nelson*, 11 Nev. 334. See, also, 3 Greenleaf, Evidence (15th ed.), § 224. The rule is stated in 18 Enc. Pl. & Pr., p. 1223:

“As a general rule it is necessary to charge the ownership of the property alleged to have been taken; but in some jurisdictions an erroneous allegation in this particular is held to be immaterial, as it is not, strictly speaking, of the gist of the offense.”

Two cases have been brought to our attention holding that the allegation of ownership in another in the indict-

ment for robbery may be dispensed with. In *State v. Diley*, 15 Ore. 70 (13 Pac. 648), it was so ruled. There the court observed:

“The indictment at common law would have been defective. It would have been necessary under that system to have averred specially to whom the money belonged. The fact that it might have belonged to the robber, and not to the person robbed, had to be negatived. . . . But our statute has dispensed with the necessity of so useless a requirement. It has provided, in express terms, what shall be a sufficient statement in an indictment for robbery, being armed with a dangerous weapon. (Crim. Code, § 71).”

Likewise in *Clemons v. State*, 92 Tenn. 282 (21 S. W. 525), it was determined that the omission of the allegation of ownership in another was not a fatal defect, on the ground, as stated by the court, that “the essential ingredients of the offense are the felonious and forcible taking from the person of another of goods of value by violence, and the indictment containing all the words of the statute was sufficient.” We are not impressed sufficiently with the soundness of the reasons stated in these two cases to commend an omission of the statement of the essential elements of the crime. It is surely essential to prove that the property taken was in another than the defendant. Literally, the defendant may have committed every act charged in the information, and yet not be guilty of robbery or larceny. It is true, the legislature may state a form for the indictment and attach a definition to words used therein, which can then become the equivalent of the ordinary requirement of the indictment for robbery. But our attention has not been called to any such provision in our statutes.

2. It seems clear that, under an information for robbery, a conviction may be had for the lesser offense in-

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Syllabus.

cluded therein of larceny. It is stated in 18 Enc. Pl. & Pr., p. 1233: "It is very generally held that a conviction of larceny may be had upon an indictment for robbery;" and the authorities cited support the text. It will be observed that in the case of *State v. Johnson, supra*, the provisions of our Code relative to description of the money, the subject of larceny and embezzlement, were applied to robbery. The evidence of the defendant tended to show a larceny,—that is, he denied the use of force and violence and putting in fear, but admitted the taking of twenty dollars; and we think, under the circumstances, too, that his question to the court at the trial, whether the court would instruct on the subject of larceny, and his exceptions to the instruction of the court, though informally made, were sufficient to require the court to instruct upon the crime of larceny as included within the charge of robbery, if the charge of robbery was correctly stated.

The judgment is reversed.

FULLERTON and ANDERS, JJ., concur.

[No. 3595. Decided February 18, 1901.]

STATE OF WASHINGTON ON THE RELATION OF SPOKANE & BRITISH COLUMBIA TELEPHONE & TELEGRAPH Co., *Appellants*, v. CITY OF SPOKANE *et al.*, *Respondents*.

CONSTITUTIONAL LAW — EXCLUSIVE PRIVILEGES.

Where a municipality has not by ordinance or contract attempted to give an exclusive right to the use of its streets to a telephone company to whom it had granted an easement therein, its refusal to grant the same rights to another telephone company, under its charter (Bal. Code, § 739, subd. 7), empowering it to authorize or prohibit the use of electricity in or upon any

of its streets, would not raise any question as to the violation of art. 1, § 12, of the state constitution, which provides that "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

SAME — SELF-EXECUTING PROVISIONS.

Art. 12, § 19, of the state constitution, which declares the right of any corporation or individual to construct and maintain lines of telegraph and telephone upon the streets and highways within the state, that such lines shall be common carriers, and that the right of eminent domain is extended to them, is not self-operative, but by its own terms imposes the duty on the legislature of providing by general law reasonable regulations to give effect to the section, and hence confers no power to use the streets and highways other than as the legislature may provide.

MUNICIPAL CORPORATIONS — USE OF STREETS BY TELEPHONE LINES — POWER OF CITY TO REFUSE — CONSTRUCTION OF STATUTE.

There being no restriction on the legislative control of streets and highways contained in art. 12, § 19, of the constitution, which declares the right of individuals and corporations to maintain lines of telegraph and telephone within the state, the provision in Bal. Code, § 4369, the statute passed pursuant to such constitutional declaration, "that where the right-of-way, as herein contemplated, is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone line can be erected thereon," is valid, and amounts to an authorization to the council to refuse, as well as consent, to such use of the streets, and is not intended as an authorization of power merely to prescribe reasonable and proper regulations for the construction and operation of such lines, inasmuch as the power of regulation and control is amply conferred by Bal. Code, § 739, subd. 7.

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge. Affirmed.

Stoll & Macdonald, Henley, Kellam & Lindsley (W. S. Dawson, of counsel), for appellant.

Fred M. Dudley, for respondents.

The opinion of the court was delivered by

REAVIS, C. J.—The appellant (plaintiff) is a corporation created under the laws of the state for the purpose of constructing and operating a telephone line and system within this state between the Canadian boundary on the north and the city of Spokane on the south. It made application to the city of Spokane for the city's consent to erect its telephone poles and construct its wires through the streets of the city. In its application it offered to submit to such reasonable rules and regulations as might be imposed by the city. Upon consideration of the application by the city council, such consent was refused. Appellant thereafter instituted proceedings in the nature of mandamus to compel the city to give its consent to the construction and operation of appellant's telephone system, and that the city be required to prescribe reasonable rules and regulations therefor. The affidavit upon which the application was based states that appellant was willing to abide by and conform to any reasonable rules and regulations imposed by the city; that it had built and was operating and maintaining a system of telephones between the town of Northport and the city of Spokane, a branch line from the town of Myers Falls to the town of Republic, and another line from Bossburg to the boundary line between the United States and Canada, connecting with towns in the province of British Columbia; that it was under contractual relations with another company owning and operating telephones in the province of British Columbia by which it was required to deliver the messages of the foreign company within this state, and especially within the city of Spokane; that in 1896 it had entered into a contract with the Inland Telephone & Telegraph Exchange, in the city of Spokane, owning and operating lines of telephone in Idaho, Oregon, California, and elsewhere in this

state; that under the terms of such contract the wires of appellant were connected with the central office of the Inland Telephone & Telegraph Company in the city of Spokane, and, as occasion required, were connected with the system of the Inland Telephone Company and the telephones of its numerous subscribers in the city of Spokane; that, by reason of such contract, appellant had procured a large and lucrative business which produced an income of many thousand dollars per month, and was rapidly increasing; that in June, 1899, the Inland Telephone Company terminated its contract with appellant and severed its lines from its office, rendering impossible any communication from appellant's lines to those of the Inland Company, and making communication impossible between the customers and patrons of appellant and persons having telephones in offices or residences in the city of Spokane; and that, to enable appellant to properly transact its business and give proper service to the public as a common carrier, it became necessary for appellant to establish an exchange at the city of Spokane. An alternative writ of mandamus was issued from the superior court. The respondent city appeared and demurred to the writ, and moved that the same be quashed. The demurrer was sustained.

Pertinent to the issues involved in the controversy are the following provisions of the constitution of Washington:

"No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." Article 1, § 12.

"Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines

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of telegraph and telephone within this state, and said companies shall receive and transmit each other's messages without delay or discrimination, and all of such companies are hereby declared to be common carriers and subject to legislative control. Railroad corporations organized or doing business in this state shall allow telegraph and telephone corporations and companies to construct and maintain telegraph lines on and along the rights-of-way of such railroads and railroad companies, and no railroad corporation organized or doing business in this state shall allow any telegraph corporation or company any facilities, privileges, or rates for transportation of men or material or for repairing their lines not allowed to all telegraph companies. The right of eminent domain is hereby extended to all telegraph and telephone companies. The legislature shall, by general law of uniform operation, provide reasonable regulations to give effect to this section." Article 12, § 19.

Paragraph 7, § 739, Ballinger's Code, vests cities of the first class, of which respondent is one, with power—

"To lay out, establish, open, alter, widen, extend, grade, pave, plank, establish grades, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and other public grounds, and to regulate and control the use thereof, and to vacate the same, and to authorize or prohibit, the use of electricity at, in, or upon any of said streets, or for other purposes, and to prescribe the terms and conditions upon which the same may be so used, and to regulate the use thereof."

Section 4369, Id., provides:

"Any telegraph or telephone corporation or company, or the lessees thereof, doing business in this state, shall have the right to construct and maintain all necessary lines of telegraph or telephone for public traffic along and upon any public road, street, or highway, along or across the right-of-way of any railroad corporation, and may erect poles, piers, or abutments for supporting the insulators, wires and any other necessary fixtures of their

lines, in such manner and at such points as not to incommode the public use of the railroad or highway, or interrupt the navigation of the waters: provided, that when the right-of-way of such corporation has not been acquired by or through any grant or donation from the United States, or this state, any county, city or town therein, then the right to construct and maintain such lines shall be secured only by the exercise of the right of eminent domain, as provided by law: provided further, that where the right-of-way, as herein contemplated, is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone lines can be erected thereon."

1. The issue involved is succinctly stated by counsel for appellant:

"Has the city council the power to refuse the use of its streets to a corporation competent and qualified to erect a telephone exchange within the city?"

Counsel have first addressed themselves to constitutional rights, and maintain that § 12, art. 1, of the constitution, *supra*, inhibits municipalities from granting exclusive franchises, and that, as such franchise has been granted to one telephone company by the city, the refusal to grant another to appellant in fact constitutes the first grant an exclusive one; and well-considered authority is cited to sustain the principle that neither the city nor the legislature may grant exclusive privileges. Among them are *Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 19; *State ex rel, Attorney General v. Cincinnati Gaslight & Coke Co.*, 18 Ohio St. 262. The argument against the power to grant an exclusive privilege is sound, and is fully sustained in the rule announced by this court in *North Springs Water Co. v. Tacoma*, 21 Wash. 517 (58 Pac. 773, 47 L. R. A. 214). But the question of the power to grant an exclusive privilege cannot arise here.

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If the city had attempted to grant such privileges to a telephone company, so as to disable itself from consenting to the construction of another telephone system through its streets, such attempt would be void and beyond its power. The city cannot by ordinance or contract disable itself to consent to the erection of telephone lines upon its streets. The volition to consent or refuse is one of the powers vested by the legislature in cities of the first class, and this continuing power cannot be divested without the sanction of the legislature. The legislature, within constitutional limitations, has sovereign control of the streets and highways of the state and the cities. The primary purpose for which highways and streets are established and maintained is for the convenience of public travel. The use of such highways and streets for water mains, gas pipes, telephone and telegraph lines is secondary and subordinate to the primary use for travel, and such secondary use is permissible only when not inconsistent with the primary object of the establishment of such ways. *Cincinnati Inclined-Plane Ry. Co. v. City & Suburban Tel. Ass'n*, 48 Ohio St. 390 (12 L. R. A. 534, 29 Am. St. Rep. 559, 27 N. E. 890); *Hudson River Tel. Co. v. Waterliet Turnpike & R. Co.*, 135 N. Y. 292 (17 L. R. A. 674, 31 Am. St. Rep. 838, 32 N. E. 148); *Halsey v. Rapid Transit St. Ry. Co.*, 47 N. J. Eq. 380 (30 Atl. 859). It would seem that, within the fundamental limitations mentioned, the legislative control of ways and streets for its secondary use is absolute, and that the legislative discretion in this regard is not subject to judicial intervention. That the legislature may delegate to municipalities such powers and act through their instrumentality is unquestioned. 2 Dillon, *Municipal Corporations* (3d ed.), §§ 705, 724; *Pacific R. R. Co. v. Leavenworth*, 18 Fed. Cas. 953 (No. 10,649). The city streets are

limited in dimension. It is apparent that the secondary uses of the streets are physically restricted. When such limit is approached or reached must be determined by some competent authority. The inconvenience, too, of the obstruction of the streets for any secondary uses, and also the breaking up of the solid surface, which is frequently of stone and other expensive material, all suggest the propriety of the control of such uses in the discretion of the municipality.

It is further urged that § 19, art. 12, of the constitution declares the right of any corporation or individual to construct and maintain lines of telegraph and telephone within the state, and that such lines are declared to be common carriers, and the right of eminent domain was extended to them. It may be observed that, in the absence of such constitutional provision, telegraph and telephone companies could derive such rights from the legislature and it may also be seen that the same section imposes the duty on the legislature to provide by general law reasonable regulations to give effect to the section. The important feature of the section seems to be the duty imposed on the right of way of railroad corporations. The section of the constitution, however, is not self-operative, but requires the action of the legislature to give it effect. There is no prescription of rights referable to the roads, highways, and streets of the state. The obvious construction of this provision is that all such rights were left to the discretion of the legislature. The only right absolutely declared is to maintain lines of telegraph and telephone within the state.

2. It may be observed, then, that § 4369, Ballinger's Code, is pursuant to the constitutional declaration upon the subject of telegraphs and telephones. The statute authorizes the construction and maintenance of all neces-

sary lines of telegraph and telephone for public service along and upon any public road, street, or highway. But when the right of way has not been acquired by grant or donation from the United States or the state, or any county, city, or town, the right must be secured by the exercise of eminent domain; and it is further declared "that where the right-of-way, as herein contemplated, is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone line can be erected thereon." The contention of counsel for appellant that the statute limits the authority of the city council to reasonable and proper regulations, and to prescribing the method in which telegraph and telephone companies shall construct and operate their lines, cannot be conceded. As has been seen, by another statute, the authority to regulate and of complete control of such lines has been given. The power to refuse is correlative with the power to consent, and such power is plainly authorized by the statute. The first clause of the section grants the easement along any public road, street, or highway, and across the right-of-way of any railroad corporation, in such manner as not to incommode the public use of the railway or highway. This provision reserves the necessary power of police regulation everywhere in the state, and it has been seen that the same power to regulate and control the use of the street was in apt terms conferred upon cities of the first class. The authorities cited by appellant in *Inhabitants of Summit Township v. New York & N. J. Tel. Co.*, 57 N. J. Eq. 123 (41 Atl. 146), and *Atlantic City Waterworks Co. v. Consumers' Water Co.*, 44 N. J. Eq. 427 (15 Atl. 583), construe different grants of power and upon different states of fact from those appearing in the case at bar and under our statute. In addition

to the reasons suggested heretofore for imposing the powers and duties upon municipalities to control the streets, it is pertinent to refer to the long usage in this country for vesting such authority in municipalities. Such usage is historical, and is expressed in many statutes in the different states and in the mother country. The people of a municipality, who incur and pay the expenses for the construction and maintenance of their streets, and who largely use them, are usually most capable of exercising discretion in the secondary and subordinate purposes for which their streets shall be used. A recent case from the circuit court of appeals of the Fourth circuit (*Southern Bell Telephone & Telegraph Co. v. Richmond*, 103 Fed. 31), in which the statute of the state of Virginia upon the particular controversy involved is substantially the same as our statute, is very much in point here. Under the Virginia statute the power of the city council to withhold consent or attach any conditions thereto was fully sustained.

The judgment is affirmed.

DUNBAR and ANDERS, JJ., concur.

[No. 3479. Decided February 19, 1901.]

C. F. SEAL, *Appellant*, v. G. W. CAMERON *et al.*, *Respondents*.

FLEADING — TESTING COMPLAINT BY MOTION — HARMLESS ERROR.

The action of the trial court in permitting the sufficiency of a complaint to be tested by a pleading called a "motion" instead of a "demurrer," was not prejudicial error, when the motion was in substance a demurrer, was so treated by the court, and the issue raised by it was tried in the same way as if it had been called a demurrer.

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SAME — SUFFICIENCY OF COMPLAINT — PLEADING WRITTEN INSTRUMENTS — LEGAL EFFECT.

In an action to enjoin stockholders from interference with plaintiff's exercise of the office of trustee and manager of a private corporation, it is sufficient, when necessary to plead the articles of incorporation and by-laws of the corporation, to state them in substance and according to their legal effect, without setting them out *in haec verba*.

Appeal from Superior Court, Clallam County.—Hon. JAMES G. McCLINTON, Judge. Reversed.

Albert W. Buddress and *George C. Hatch*, for appellant:

The sufficiency of a pleading in matters of substance must be tried on demurrer and not on motion. *Hoffman v. Wight*, 137 N. Y. 621 (33 N. E. 554); *McCoy v. Stockman*, 146 Ind. 668 (46 N. E. 21); *Rhodabeck v. Blair Town Lot & L. Co.*, 62 Iowa, 368 (17 N. W. 582); *Wattels v. Minchen*, 93 Iowa, 517 (61 N. W. 915); *Hershiser v. Delone*, 24 Neb. 380 (38 N. W. 863); *Finch v. Finch*, 10 Ohio St. 501; *Walker v. Pumphrey*, 82 Iowa, 487 (48 N. W. 928); *Jackson v. Independent School District*, 77 N. W. 860; *Consolidated Coal Co. v. Peers*, 166 Ill. 361 (46 N. E. 1105, 38 L. R. A. 624); *Tully v. Herrin*, 44 Miss. 639; *Fletcher v. Crist*, 139 Ind. 121 (38 N. E. 472); *State ex rel Nave v. Newlin*, 69 Ind. 108; *Indianapolis Piano Mfg. Co. v. Caven*, 53 Ind. 258.

Trumbull & Trumbull, for respondents:

To properly plead the by-laws they should be set out *in haec verba*. Thompson, Corporations, §§ 944-949; 5 Enc. Pl. & Pr., p. 94.

The opinion of the court was delivered by

FULLERTON, J.—The appellant brought this action to enjoin the defendants from interfering with his exercise

of the office of trustee and manager of the Groveland Improvement Company, a private corporation. The respondents demurred to the original complaint, which demurrer, after a hearing, was sustained by the trial court, and leave was granted the appellant to file an amended complaint. After the filing of the amended complaint the respondents moved "for an order striking" it, on the grounds—First, that it was not an amendment of the original complaint, but the statement of a new cause of action; and, second, because the amended complaint did not state facts sufficient to constitute a cause of action. The trial court overruled the motion on the first ground stated, and sustained it as to the latter. The appellant thereupon elected to stand upon his complaint and refused to plead further, whereupon the court entered a judgment dismissing the action.

The first ground for reversal urged is, that the trial court erred in permitting the sufficiency of the complaint to be tested by motion, instead of requiring it to be done by a demurrer. Whatever force this contention might have in a case where the motion to strike was based upon the statutory grounds for striking a complaint, we think it can have but little weight in determining the question presented here. The so-called motion was in substance a demurrer. It was so treated by the trial court; and the issue raised by it was tried in the same way it would have been, and the appellant was granted all the rights and privileges he would have been entitled to, had the pleading been called a "demurrer," instead of a "motion," as it was called. Courts determine the nature of a pleading by an examination of its substance and a consideration of its object and purpose rather than from the name the parties may choose to call it; and unless it be shown that the adverse party has been denied the right to try the

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actual issue presented, or has otherwise lost some substantial right, because of the misnomer, error cannot be predicated thereon.

It is next contended that the court erred in holding that the complaint did not state facts sufficient to constitute a cause of action. This contention must be sustained. We are not advised of the ground upon which the trial court based its ruling, but the only ground urged upon us here for sustaining the ruling is that the articles of incorporation and by-laws of the corporation attempted to be pleaded were not set out *in haec verba*. This was unnecessary. In pleading instruments of this character the pleader is at liberty to adopt the rules which pertain in pleading other instruments which furnish the foundation of the action. He may set them out *in haec verba*, or he may state them in substance and according to their legal effect, without reciting their exact language. It is not denied that the complaint in this case contains the substance of the articles of incorporation and the by-laws of the corporation so far as the same are material to the cause of action stated. As this was all that was necessary, the complaint should have been sustained.

The judgment of the lower court is reversed, and the cause is remanded with instructions to reinstate the case and require the defendants to answer.

REAVIS, C. J., and DUNBAR and ANDERS, JJ., concur.

[No. 3642. Decided February 19, 1901.]

BANCROFT-WHITNEY COMPANY, *Appellant*, v. RICHARD GOWAN, *Respondent*, S. B. FOLGER, *Appellant*.

CLAIM AND DELIVERY — BOND — JUDGMENT AGAINST SURETY.

Where judgment is entered in favor of defendant in an action of claim and delivery, it is error to include therein judgment against a surety upon the bond given by plaintiff for the purpose of obtaining possession of the goods at the commencement of the action.

CHATTEL MORTGAGE — DEFAULT — ACTION FOR POSSESSION OF GOODS.

Where a chattel mortgage gives the mortgagee the right, in case of default in payment, to take possession of the goods and retain them, such right of possession may be enforced by an action of claim and delivery.

Appeal from Superior Court, King County.—Hon. ORANGE JACOBS, Judge. Reversed.

Mitchell Gilliam, for appellants:

Claim and delivery under our statute is purely a possessory action, and right of possession is all that is required. *Lazard v. Wheeler*, 22 Cal. 142. A lien created by a chattel mortgage, and giving the mortgagee right of possession upon default in the conditions of the mortgage, is sufficient to sustain an action of claim and delivery. *Jones v. Annis*, 28 Pac. 156; *J. I. Case Threshing Machine Co. v. Campbell*, 13 Pac. 324; *Cobbey, Replevin*, §§ 172, 173; *Cobbey, Chattel Mortgages*, § 482; *Jones, Chattel Mortgages*, § 706.

Richard Gowan, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This action was brought by the plaintiff for the purpose of recovering from the defendant (re-

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spondent) possession of a lot of law books described in the complaint. At the time of the commencement of the action an affidavit and bond in claim and delivery were lodged with the sheriff, and the property taken from the respondent and delivered to the plaintiff. The action was founded upon a written instrument executed and delivered by the respondent to the plaintiff, of which the essential part is as follows:

“State of Washington, county of Kittitas.

“Know all men by these presents: That I have purchased from Bancroft-Whitney Co., of San Francisco, Cal., the following named books [describing the books], for which I am to pay the Bancroft-Whitney Co. the sum of three hundred ninety-eight dollars as evidenced by four notes, viz: [setting forth the notes]; and the title and property in said books is to remain in the said Bancroft-Whitney Co. until said books are paid for. In case I do not pay for the same at maturity, the said Bancroft-Whitney Co. may take possession of said books and retain the same, or may sell them, without taking possession of them, and retain whatever was due thereon, and turn over the balance to me; Provided, That the said Bancroft-Whitney Co. may perform any power herein conferred on them by agent or attorney. [Signed.] Richard Gowan.”

The complaint made the usual allegations based upon the contract, and the respondent answered, making a general denial, with the exception of two or three counts in the complaint, but did not allege in said answer that the instrument was intended or agreed to be a chattel mortgage. Afterwards respondent obtained leave to file an amended answer, which contained an affirmative defense to the effect that, at the time of the execution of the instrument, it was mutually understood and intended that it should serve as a chattel mortgage on the property

therein described. This affirmative allegation of the answer was denied by reply.

At the commencement of the trial the plaintiff tendered to the respondent the notes mentioned in the instrument under consideration. At the time of the execution of the instrument the books in controversy were at Ellensburg, in Kittitas county, but before the commencement of the action they were brought by the respondent to Seattle, in King county, without permission of appellant to remove them. Upon the trial of the cause verdict was rendered in favor of the respondent, and judgment was subsequently entered, not only against the plaintiff, but against S. B. Folger, surety on the claim bond, and the entering of such judgment against Folger is one of the errors assigned in this case. For this error the judgment will have to be reversed. *Edison v. Woolery*, 10 Wash. 225 (38 Pac. 1025). This error is, however, admitted by respondent, and he asks that the judgment be modified to the extent that Folger be acquitted from the judgment, but that it remain in force against the plaintiff. But, as we view the law on the other propositions involved, the modification asked for would be of no avail.

The question of whether the contract was a chattel mortgage, under the affirmative allegations of the answer, was submitted to the jury under the following instructions:

"1. The object of a chattel mortgage is to give security either for an antecedent indebtedness or an indebtedness accruing at the time of the execution of the instrument. A mortgage gives to the mortgagee no title to mortgaged property. It only creates a lien, which can only be enforced by a suit in a court of competent jurisdiction, or by notice and sale in the manner prescribed by statute.

"2. If you find from the evidence that the instrument

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in evidence was given as security for a debt previously existing, then its effect would be that of a chattel mortgage, and your verdict should be for the defendant.

"3. A mortgage gives to the mortgagee no title to the property. The rule used to be different. The mortgagee having no title to the property, an action of this kind cannot be sustained if the instrument was intended to be a mortgage."

These instructions are assigned as error. It was the view of the court, and it is contended by the respondent, that, under the rule announced by this court in *Silsby v. Aldridge*, 1 Wash. 117 (23 Pac. 836); *Kerron v. North Pacific L. & M. Co.*, 1 Wash. 241 (24 Pac. 445), and *McClellan v. Gaston*, 18 Wash. 472 (51 Pac. 1062), conceding the instrument to be a chattel mortgage, the mortgagee had no title to the property, and action of replevin would not lie to obtain possession of the same; that in this state the chattel mortgage is only a lien, and title can be acquired only by foreclosure and sale under the statutory procedure by notice and sale. In the cases cited by respondent and relied upon by him the question here was not involved. We held in *Silsby v. Aldridge*, *supra*, that the chattel mortgage, which was the ordinary chattel mortgage, did not convey to the holders any title to the property in question; that, under the Code, the possession of the property could be obtained only in the manner pointed out. But there was no question there as to whether the instrument was a mortgage or whether it had actually conferred title and power to take possession. In *Kerron v. North Pacific L. & M. Co.*, *supra*, the instrument which was under construction was in its form the ordinary chattel mortgage, and the cause was reversed on the doctrine announced in *Silsby v. Aldridge*, *supra*. In *McClellan v. Gaston*, *supra*, it was held that a provision in a chattel mortgage, authorizing the mort-

gagee, in case of default or insecurity of the debt, to take possession of the mortgaged property, using all necessary force to do so, did not warrant the mortgagee or the sheriff in taking possession thereof over the objection of the mortgagor, but that, in the absence of the mortgagor's consent, the contract could be enforced only by due process of law. This was upon the express ground that the mortgagee had no right to commit a breach of the peace to obtain his contract rights. But, whatever may be the conclusion reached by the courts in relation to the right of the mortgagee to bring an action for possession where there is no provision in the instrument empowering the mortgagee to take possession on default of payment, in this case express authority is granted by the provisions of the instrument itself. Neither did the plaintiff, as in the case of *McClellan v. Gaston, supra*, undertake to enforce its remedy outside of the law, but it has brought itself within the terms of the contract, and the contract is not susceptible of construction. Its terms are too definite, direct, and plain to be varied by oral testimony. It provides that the Bancroft-Whitney Company may take possession of said books and retain the same, or may sell them without taking possession of them. With this right plainly and unequivocally guaranteed to the company by the contract, it was warranted in bringing the action in the form in which it did bring it, for the purpose of obtaining possession of the property. With this view of this proposition, it becomes unnecessary to review the other errors alleged.

The judgment is reversed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ.,
concur.

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Argument of Counsel.

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THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM
DE PAOLI, *Appellant*.

CRIMINAL LAW — MISDEMEANOR — PROSECUTION BY INFORMATION —
GROUNDS FOR.

The rule governing in case of prosecutions by information for felony, that the information need not allege the grounds justifying procedure in that form rather than by indictment, but that defendant must urge objections because of the absence of grounds for the filing of an information prior to his plea thereto, is applicable also in prosecutions for misdemeanor by information.

SAME — SELLING LIQUOR TO MINOR — SUFFICIENCY OF INFORMATION.

An information which charges that defendant "did wilfully, unlawfully and knowingly sell and give intoxicating liquor," to a minor, sufficiently charges that defendant had knowledge of the minority of the purchaser, and the word "knowingly" is not referable to the act of selling the liquor alone, but imports knowledge of the thing done as well as an evil intent or bad purpose in doing such thing.

Appeal from Superior Court, King County.—Hon.
E. D. BENSON, Judge. Affirmed.

Fred H. Peterson, for appellant:

Whenever a particular knowledge is essential to the constitution of an offense, it must be alleged, and it must be alleged in every material part of the description where it so constitutes it. Clark, Criminal Procedure, p. 192. The question of knowledge is the essential point in a prosecution of this sort and it should have been alleged that said appellant then and there knew said Sweeney to be a minor. *Fielding v. State*, 52 S. W. 69; *Commonwealth v. Boynton*, 12 Cush. 449; *United States v. Slenker*, 32 Fed. 691; *United States v. Carll*, 105 U. S. 611.

(26 L. ed. 1135); *Commonwealth v. Young*, 15 Grat. 664; *State v. Freeman*, 6 Blackf. 248. There are many cases where the same question has been passed upon where the offense of "knowingly" uttering a forged instrument was charged. *Gates v. State*, 16 South. 342; *Powers v. State*, 87 Ind. 97; *People v. Smith*, 37 Pac. 516; *People v. Mitchell*, 28 Pac. 597.

Upon the point that the indictment would be insufficient, though following the language of the statute, unless it alleges knowledge, counsel cites *Commonwealth v. Filburn*, 119 Mass. 297; *State v. Henderson*, 15 Wash. 598; *United States v. Thomas*, 69 Fed. 588; Bishop, *Statutory Crimes* (2d ed.), p. 578.

The opinion of the court was delivered by

DUNBAR, J.—The appellant was charged with the offense of selling liquor to a minor, was convicted, and from the judgment of conviction this appeal is taken. There are two assignments: First, that the court erred in denying the motion to quash the information because no preliminary examination had been had, nor any reason alleged or shown why the same was omitted; second, that the court erred in refusing to grant appellant's motion in arrest of judgment on the ground that the information did not state facts sufficient to constitute a crime or offense. It is alleged by the appellant that the information should have been quashed because no preliminary examination had been held, and it is stated in appellant's brief that it was admitted in open court that such was the fact and that there was no reason why a preliminary examination should not have been had. It is a sufficient answer to this objection that the record does not disclose the admission of the fact, or whether or not a grand jury was in session. The rule which this court has applied to in-

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formations for felony in this respect should apply to informations for misdemeanors.

The second contention is that the information did not state facts sufficient to constitute a crime or offense. The information, as far as material, was in the following language:

“William De Paoli is hereby accused . . . of the crime of selling intoxicating liquor to a minor, committed as follows, to-wit: He, the said William De Paoli, in the county of King, state of Washington, on the 20th day of May, 1900, did wilfully, unlawfully, and knowingly sell and give to one Thomas Sweeney intoxicating liquor, commonly called whisky, without the written consent or permission of either of the parents of the said Thomas Sweeney; the said Thomas Sweeney then and there being a minor of the age of seventeen years.”

It is insisted that the word “knowingly” applies simply to the words “sell and give,” and that appellant is not charged with knowledge of the fact that Thomas Sweeney was a minor, but is charged only with knowledge of the fact that he sold intoxicating liquors to Thomas Sweeney. We think this contention is hypercritical. There are some cases that seem to sustain this view, but a much broader and more sensible construction, in our opinion, is placed upon statutes of this kind by the United States supreme court in *Rosen v. United States*, 161 U. S. 29 (16 Sup. Ct. 434). There, under a statute which prevented the depositing in the postoffice of the city of New York of obscene literature, Rosen was indicted under the following phraseology: “Did unlawfully, wilfully, and knowingly deposit and cause to be deposited in the postoffice of the city of New York, for mailing and delivery by the postoffice establishment of the United States, a certain obscene, lewd and lascivious paper,” etc.; and the defendant there, as here, moved in arrest of

judgment upon the ground that the indictment did not charge that Rosen knew at the time that the contents of the letter were obscene, etc., but that the word “knowingly” applied only to the fact of depositing the letter in the postoffice. Justice HARLAN, in delivering the opinion of the court, in response to this contention made the following sensible observation :

“Of course he did not understand the government as claiming that the mere depositing in the postoffice of an obscene, lewd and lascivious paper was an offense under the statute, if the person so depositing it had neither knowledge nor notice, at the time, of its character or contents. He must have understood from the words of the indictment that the government imputed to him knowledge or notice of the contents of the paper so deposited. In their ordinary acceptation, the words ‘unlawfully, wilfully, and knowingly’ when applied to an act or thing done, import knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing; and when used in an indictment in connection with the charge of having deposited in the mails an obscene, lewd, and lascivious paper, contrary to the statute in such case made and provided, could not have been construed as applying to the mere depositing in the mail of a paper the contents of which at the time were wholly unknown to the person depositing it.”

This case was followed and approved by the same court in *Price v. United States*, 165 U. S. 311 (17 Sup. Ct. 366), and is in harmony with modern decision and the spirit of the Code. It would be idle to say that, under the language used in this information, the defendant did not know that he was charged with selling liquor to a minor, knowing him to be a minor. “Knowingly” cannot possibly refer to the sale; for, of course, any conscious and sane man who sells liquor knows that he sells it. Again, this information is as strong as the statute and is in

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Syllabus.

the language of the statute, the statute being, "Every person who shall knowingly sell or give to a minor intoxicating or spirituous liquor," etc., and it is not to be presumed that the legislature intended to provide a punishment for a person who should knowingly sell liquor to a minor, not being cognizant of the fact that such person was a minor. But, placing the same construction upon the statute that appellant seeks to place upon the information, the appellant is guilty in any event; for he is charged with knowingly selling liquor to a minor, and that charge meets the requirements of the statute. But such construction is an unreasonable one when applied to either the statute or the information. The information is sufficient, and the judgment is affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3579. Decided February 20, 1901.]

THE STATE OF WASHINGTON, *Appellant*, v. ALFRED JOHNSON, *Respondent*.

CRIMINAL LAW — ORDER GRANTING NEW TRIAL — APPEAL BY STATE.

Under Bal. Code, § 6500, subd. 7, which provides that an appeal shall not be allowed to the state in any criminal action, except when the error complained of is in setting aside the indictment or information, or in arresting the judgment on the ground that the facts stated in the indictment or information do not constitute a crime, or in some other material error in law not affecting the acquittal of a prisoner on the merits, an order granting a new trial to the defendant would not be appealable on the part of the state.

Appeal from Superior Court, Spokane County.—Hon. E. D. BENSON, Judge. Appeal dismissed.

James Z. Moore, Prosecuting Attorney, *Miles Poindexter* and *Horace Kimball*, for the State.

Robertson & Miller, for respondent:

If the right to appeal from an order granting a new trial is not given by the constitution or statute, it does not exist, for at common law there was none. *People v. Richmond*, 16 Colo. 274; *Sharpe v. Robertson*, 5 Grat. 518; *Norman v. Curry*, 27 Ark. 440; *Wadsworth v. Davis*, 63 N. C. 251; *People v. Corning*, 2 N. Y. 9 (49 Am. Dec. 364); *People v. Dill*, 2 Ill. 257.

The constitution (art. 4, § 4) vests in the supreme court appellate jurisdiction of all actions and proceedings, with certain exceptions. This does not confer the right to appeal in any and all cases without reference to legislation. Bal. Code, § 6500, defines the determinations from which an appeal may be had. That this is the interpretation placed by this court upon the constitutional provision above mentioned is apparent from many decisions, among which may be mentioned *Greene v. Williams*, 6 Wash. 260; *Armstrong v. Ford*, 10 Wash. 66; *Horton v. Barto*, 17 Wash. 675; *Embree v. McLennan*, 18 Wash. 652. See, also, *Ex parte Haughton*, 38 Ala. 570; *Titus v. Latimer*, 5 Tex. 433; *Houghton's Appeal*, 42 Cal. 35; *Dismukes v. Stokes*, 41 Miss. 430.

The declaration by the statute that the right of appeal shall exist in certain cases denies by implication the right of appeal in all other cases, and this although there be no express terms of negation. *Durousseau v. United States*, 6 Cranch, 312 (3 L. ed. 232); *Ex parte McCardle*, 7 Wall. 506 (19 L. ed. 264).

The rule is that unless there is some statute expressly allowing an appeal, no such right exists. *French v.*

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People, 77 Ill. 532; *State v. Cole*, 39 La. An. 938; *People v. Trezza*, 128 N. Y. 529; *McGinnis v. Commonwealth*, 102 Pa. St. 66; *State v. Davenport*, 38 S. C. 348; *State v. Smith*, 49 Kan. 358; *State v. Jones*, 7 Ga. 422; *State v. Heisserer*, 83 Mo. 692; *State v. Hamilton*, 106 N. C. 660; *Carter v. State*, 4 Tex. App. 165; *People v. Swift*, 59 Mich. 541; *Commonwealth v. Dobbins*, 9 Bush, 1. And this doctrine has been applied in a number of the cases cited to appeals from motions granting a new trial. See, also, *Ketchum v. Dennis*, 41 Ala. 183; *Wallace v. Middlebrook*, 28 Conn. 464; *Evans v. Adams*, 12 Ga. 44; *J. W. Reedy Elevator Mfg. Co. v. Pitvowsky*, 35 Ill. App. 364.

The opinion of the court was delivered by

DUNBAR, J.—The respondent was indicted for perjury, was tried and convicted, but, upon the motion of his attorneys, the court granted him a new trial. From such order of the court the state appeals, and the respondent interposes a motion to dismiss on the ground that the order was not appealable. We think this motion must be sustained. At the common law an appeal would not lie from the ruling of a lower court in a criminal case on behalf of the state. It follows, then, that, if any right to appeal exists, it must be by constitution or by statute. While the constitution provides that the supreme court shall have appellate jurisdiction in all actions and proceedings, it does not undertake to confer the right of appeal in a particular case, but leaves such provisions to the discretion of the legislature, and the statute defines the determinations from which an appeal may be had. Section 6500, Bal. Code, recites the orders or judgments from which appeals may lie. The first six sub-sections of the act have reference specially to civil actions, and

the fact that an appeal is provided for in civil actions from an order granting a new trial and is not provided in sub-section 7, which deals with appeals in criminal cases, would seem to exclude the idea that the statute was intended to grant the right of appeal from an order granting a new trial in a criminal action under the rule announced by the maxim that the expression of one excludes the other. If there is any provision for an appeal at all, it must be found in the last part of sub-section 7, which provides that an appeal shall not be allowed to the state in any criminal action, except when the error complained of is in setting aside the indictment or information, or in arresting the judgment on the ground that the facts stated in the indictment or information do not constitute a crime, or in some other material error in law not affecting the acquittal of a prisoner on the merits. Plainly, this appeal does not fall within the first two propositions, nor do we think it is comprehended in the last. The granting of a new trial is not exclusively an error of law; for, at the most, it is a ruling of the court upon law and facts. The statute, then, not having provided, by express words or fair deduction, for an appeal from this order, the motion to dismiss will be sustained.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3761. Decided February 20, 1901.]

L. B. DIMMICK, *Respondent*, v. H. W. COLLINS, *Appellant*.

STATUTE OF FRAUDS — PAYMENT OF ANOTHER'S DEBT AS ORIGINAL PROMISE.

An agreement to pay the debt of another as consideration for another contract between the promisor and promisee is not within the statute of frauds.

24	78
25	620
25	626
24	78
40	30
24	78
41	679

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Argument of Counsel.

SAME — ACTION ON CONTRACT — SUFFICIENCY OF EVIDENCE.

In an action by plaintiff to recover upon defendant's promise to a third party to pay such third party's debt to plaintiff, a *prima facie* case sufficient to go to the jury is established by evidence showing that such third party held a lease of certain farm lands of defendant, from which he was to have two-thirds of the grain raised by him thereon; that he had agreed to share his portion of the crop with plaintiff, in consideration of the latter's labor in raising the crop; that the lease was subsequently surrendered to defendant on his agreement to pay plaintiff the value of the services performed by him towards raising the crop; and that such services performed by plaintiff were worth \$223.25.

SAME — EVIDENCE — RELEVANCY.

In an action by plaintiff to recover the value of his services in raising a crop of grain for a tenant of defendant, and which, it was claimed by plaintiff, but denied by defendant, the latter had agreed with the tenant to pay in consideration of a surrender of the lease, evidence of the condition of the crop at the time of the alleged contract and that it was doubtful whether it would more than pay the costs of harvesting and threshing is admissible as a fact tending to show the reasonableness and probability of defendant's entering into such a contract.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Reversed.

Crow & Williams, for appellant:

Where there is a dispute between parties to litigations, as to what was said, or what was contracted, it is always competent to show the surrounding circumstances, and anything which has a bearing upon the controversy and tends to prove the reasonableness or unreasonableness of the story of either. Stephens, Digest of Evidence, art. 7; Jones, Evidence, § 138; *Moore v. Davis*, 49 N. H. 45 (6 Am. Rep. 460); *Holmes v. Goldsmith*, 147 U. S. 150 (37 L. ed. 118); *Stevenson v. Stewart*, 11 Pa. St. 307; 11 Am. & Eng. Enc. Law (2 ed.), 502, 507.

A. J. Laughon and *Del Cary Smith*, for respondent.

The opinion of the court was delivered by

MOUNT, J.—The respondent, plaintiff below, brought this action against appellant upon two causes of action. The first is, in substance, that one W. H. Darknell was indebted to plaintiff in the sum of \$223.25; that about August 31, 1899, defendant and said Darknell made and entered into an agreement by the terms of which said Darknell assigned, transferred, and sold to defendant all his right, title, and interest in and to a certain crop of wheat then growing on premises described, in Spokane county, and as consideration therefor the defendant promised and agreed to pay the said indebtedness. The second cause is substantially as follows: That in August, 1899, defendant employed plaintiff to harvest said grain above described and agreed to pay therefor the sum of one dollar and a half per acre; that under said agreement plaintiff harvested fifty-five acres of grain; a demand, and refusal to pay. Defendant answered the said first cause of action and denied the allegations thereof, and for further answer alleged that if the contract alleged was ever made the same was wholly without consideration and was never evidenced by any written memorandum. Answering the second cause of action, defendant, after denying the allegations, alleged a contract to cut thirty acres of said grain at one dollar and a half per acre, and a tender of the amount due.

The cause came on for trial before a jury, and a verdict was given by the jury for the amount prayed for in the complaint. At the close of plaintiff's case, the defendant challenged the sufficiency of the evidence and moved the court to direct a verdict for the defendant upon the first cause of action. This motion was by the court denied, and appellant assigns this ruling of the court as error. Under the rulings of this court in *Don Yook v.*

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Washington Mill Co., 16 Wash. 459 (47 Pac. 964), and in *Gilmore v. Skookum Box Factory*, 20 Wash. 703 (56 Pac. 934), the complaint stated a cause of action, and the contract was not within the statute of frauds. The other question to be considered upon this motion is whether there was any evidence to support the complaint. Witness Darknell testified substantially as follows:

"I had a lease on the N. E. quarter of section 1, township 21 north, range 45 E., W. M., which property was owned by defendant. I surrendered the lease which I held on said land to Mr. Collins. By my lease with Mr. Collins I was to receive two-thirds of the grain raised on the farm, and I had a contract with the plaintiff, Mr. Dimmick, that he should perform work in raising the said crop and should receive one-half of my two-thirds of the crop. He did work under this arrangement and had performed services of the value of \$223.25. This work consisted in plowing the ground and seeding the same. Mr. Collins agreed to pay the plaintiff the amount of \$223 which was due from me, and also to pay the note," etc.

This evidence was corroborated by the plaintiff and one other witness. It was certainly competent under the pleadings and makes a *prima facie* case. The court committed no error in denying the motion.

Appellant, at the trial, both by cross-examination of the witnesses of the defendant and by his own evidence, offered to prove the character, condition, and value of the crop at the time the contract is alleged to have been made. Objections to questions having this object in view were sustained by the court. While the defendant was on the stand as a witness in his own behalf, and after he had denied the making of the contract in which he was alleged to have assumed the said indebtedness of \$223.25, and after he had denied that he had agreed to pay any part

of the same except from the proceeds of the crop, his counsel asked him the following question: "State what the condition of the crop was"; which the court, on objection, refused to allow; whereupon his counsel made the following offer: "If the court please, the defendant now offers to prove that this crop was of very little value; that it was doubtful whether it would any more than pay the costs of harvesting and threshing, which facts were known to plaintiff and defendant and Darknell on September 8, 1900, the time of the agreement testified to"; which the court rejected. This evidence was relevant under the pleadings, and should have been permitted. It was not admissible as upon *quantum meruit*, but was admissible for the jury to consider, with the other circumstances proved, in determining as a question of fact whether the alleged contract had been made. Where there is a dispute between the parties whether or not such a contract has been made, the circumstances surrounding the transaction are permissible to show whether the contract was probable. The law assumes that men make fair bargains; that is, that when they contract they make their agreements equal. *Bedell v. Foss*, 50 Vt. 94. If A. has a horse of no value, and delivers him to B., and then says B. agreed to pay \$100 for him, B., when he denies the contract or the purchase price, may show that the horse was valueless, and that he knew at the time that he was valueless, for the purpose of showing that he would in all probability not make such a contract; and this evidence, depending upon the difference between the real value and the price, might have the weight of positive evidence. The truth is to be determined, and the jury are entitled to know the surroundings of the parties and weigh such probabilities. It is not likely that a person would agree to pay \$200 for

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Syllabus.

what was worth nothing or less than nothing. The courts will not relieve against a bad bargain, and evidence of this character is not permitted for any such purpose, but only for the purpose of discovering where the truth is. Common experience of men is valuable for this purpose. The case of *Wheeler v. F. A. Buck & Co.*, 23 Wash. 679 (63 Pac. 566), recently decided by this court, fully discusses and cites many of the authorities, and is in point upon this question and decisive of it.

Errors three and four alleged are not here considered, because these, if held error, would result only in a modification of the judgment.

The cause will be reversed and remanded for a new trial.

REAVIS, C. J., and ANDERS, DUNBAR and FULLERTON, JJ., concur.

[No. 3532. Decided February 21, 1901.]

MAGGIE FRENCH *et al.*, Respondents, v. FIRST AVENUE
RAILWAY COMPANY, Appellant.

MASTER AND SERVANT — ASSUMPTION OF RISKS.

Where an engineer in charge of the operation of the power house of a cable railway was killed by falling into the winder wheel while oiling the bearings, the facts that there were no guard rails around the wheel, that the butment on top of which he was compelled to walk in that work had a defective place in it rendering the surface uneven, and that the part of the house where the wheel was located was so insufficiently lighted that he was compelled to carry a candle while oiling, would not warrant a recovery by his family against the company, when the condition of the place was open and apparent, and the engineer had accepted the employment after full examination thereof, and had continued in the employment with knowledge of its unsafe character.

24	83
81	473
81	590
24	83
37	70
37	402
37	506
24	83
30	393
24	83
41	68

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Reversed.

Struve, Allen, Hughes & McMicken, for appellant.

Brady & Gay, for respondents:

The law is that the servant assumes only the *ordinary* risks pertaining to his employment, and that he has a right to assume that the master took proper care not to subject him to unreasonable risks or dangers. *Pittsburgh, C. & St. L. Ry. Co. v. Adams*, 5 N. E. 187; *Ryan v. Fowler*, 24 N. Y. 411 (82 Am. Dec. 315); *Mayhew v. Sullivan Mining Co.*, 76 Me. 100; *Buzzell v. Laconia Mfg. Co.*, 48 Me. 113 (77 Am. Dec. 212); *Rhodes v. Varney*, 39 Atl. 552; *McGee v. Boston Cordage Co.*, 1 N. E. 745; *Sieber v. Great Northern Ry. Co.*, 79 N. W. 95; *Wheeler v. Wason Mfg. Co.*, 135 Mass. 294; *Wible v. Burlington, C. R. & N. Ry. Co.*, 80 N. W. 679; *King v. Chicago & N. W. Ry. Co.*, 78 N. W. 837; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408 (36 L. ed. 485); *Johnson v. Bellingham Bay Imp. Co.*, 13 Wash. 455; *McDonough v. Great Northern Ry. Co.*, 15 Wash. 244; *Ogle v. Jones*, 16 Wash. 319.

The opinion of the court was delivered by

DUNBAR, J.—This action was brought by the widow and children of Walter H. French, deceased, who was killed while in the employment of the appellant, the First Avenue Railway Company. The complaint alleges the employment by the defendant as an engineer in its power house; that the said French was required to work in an unsafe place; that the defendant had negligently and carelessly allowed the platform around the winder wheels in its power house to remain unfinished, open, and ex-

Feb. 1901.] Opinion of the Court—DUNNAN, J.

posed, and without any protection, and without light or signal to indicate danger; that it had failed to provide rails or guards of any kind around the wheels; that it failed to provide proper light where the said French was required to work, and had failed to provide said French with any lamp for use in the prosecution of his work. It is alleged that all of these defects, omissions, and neglects, which were the principal defects, omissions, and neglects pleaded, were known to the defendant and unknown to the said French; that, while engaged in the performance of his duties as engineer, and unaware of danger, and without any fault or neglect on his part, and on account of the negligence of the defendant, the said French slipped, fell, and was thrown into the winder wheel in the said engine room and received the injuries from which he died. Upon the trial of the cause the jury rendered a verdict in favor of the plaintiffs for \$10,000. Judgment was entered and appeal taken to this court. At the close of plaintiffs' testimony the appellant challenged the sufficiency of the proof, and moved the court that the cause be taken from the jury and for judgment for the defense, which motion was overruled.

We have carefully examined the testimony of the plaintiffs in this case, and from such examination, without considering the testimony of the defense, we are of the opinion that the motion should have prevailed. The law in relation to the liability of employers and the duty of the employee has been so often announced at length by this court that it would serve no good purpose to go into an extended investigation of that subject now. It was held in the case of *Hoffman v. American Foundry Co.*, 18 Wash. 287 (51 Pac. 385), that the duty of the master to furnish the servant reasonably safe tools, machinery, and appliances with which to work, and the

duty of the servant to exercise due care to avoid injury, are reciprocal obligations, and the duty of each is measured by the standard of ordinary care. And this is the universal rule. In consonance with this rule, we also held, in *Olson v. McMurray Cedar Lumber Co.*, 9 Wash. 500 (37 Pac. 679), that a person employed to work about dangerous machinery assumes the risk of all apparent danger, and cannot recover for injuries received, although his employer has not instructed him as to his duties around the machiney and the danger of his employment. The doctrine that the servant assumes the risk of apparent danger is as well established as the doctrine that it is the duty of the master to furnish the servant with a safe place to work in and with safe appliances and machinery. It certainly is the duty of the engineer to observe, examine, and understand the machinery which he is operating. It is placed under his especial custody and control, and he must necessarily know more about it than the master. He is employed on the presumption that he does have this particular and certain knowledge.

But it is contended by the respondents that the engineer in this case was newly employed, and had not had sufficient time to acquaint himself with the defects in the machinery. The testimony shows,—at least, the testimony of the plaintiffs,—that it was about five feet and a half from the platform to the place where the bearings had to be oiled; that there was a ladder upon which the engineer ascended to a platform between the winder wheels, and that the place or space which he had to traverse in order to reach the oil cups to oil the machinery was somewhat defective; that there were no guards or rails to keep a person from falling if he lost his balance; that it was not walled up entirely to the wheels; that in one place the cement had fallen off from a space about

four inches wide by twelve inches long; and that the light was not sufficiently powerful to illuminate the path or way which the engineer had to travel. The testimony of Mr. French, before he died,—and he said very little on the subject,—was that he was oiling the bearings, fell into the winder wheel, and was thrown out onto the floor. It seems that when he went up to oil the machinery he took a candle with him to light him on his way. The testimony shows that he had been notified, on Sunday before commencing work, by the superintendent, that the machinery was not in as good condition as in some other shops in which French had worked, but the superintendent stated that they hoped soon to have those matters corrected, and that they would have them in a week or so. It appears, also, that French on that Sunday afternoon, after talking with the superintendent, went over to take a view of the power house and the machinery; that he came back while the superintendent was there and the superintendent said to him, "Well, I guess you didn't find things so nice up there," comparing the power house and machinery with other places about which French had been telling him. It also appears that he went up again about midnight to see them close down. In addition to this, he had charge of the power house for two days before he was hurt, the accident having occurred about eight o'clock in the evening. The testimony of plaintiff's witnesses was to the effect that it was the duty of the engineer to oil these bearings, and that they had to be oiled very frequently. So that it appears, without any contradiction, that the engineer was familiar with the alleged defects in this machinery. There were no hidden defects in the machinery. There was no danger there that was not apparent to an observing man. If there was not sufficient light the engineer knew it. If the platform on

which he had to walk was in a bad condition, he knew that, for he must have traversed it before the time at which the accident occurred. So that, conceding the truthfulness of the testimony, and all of the testimony of plaintiffs, it appears that the danger, if there was any, was apparent; that the engineer was cognizant of the defects which existed, and consequently, under the well-established rule that the servant assumes the risk of apparent danger,—a rule which is augmented in this case by the fact that the machinery in question was under the personal supervision of the person injured,—no recovery can be had.

The judgment is reversed, and the cause remanded with instructions to the lower court to dismiss the cause.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3732. Decided February 21, 1901.]

THOMAS HOWAY, *Respondent*, v. GOING-NORTHRUP
COMPANY, *Appellant*.

CONTRACT OF EMPLOYMENT — ACTION FOR BREACH — DAMAGES.

Where an action for breach of a contract of employment was commenced during the term of employment contracted for, but not tried until after the expiration of such term of employment, the plaintiff is entitled to recover the same damages that he would have been entitled to had the action been commenced after the expiration of the term.

TRIAL — REFUSAL OF REQUESTED INSTRUCTIONS — HARMLESS ERROR.

The refusal of the court to give pertinent requested instructions is not error, when the court's instructions in its own language are substantially the same as those requested by appellant.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

Feb. 1901.] Opinion of the Court—DUNBAR, J.

Byers & Byers, for appellant.

Herbert E. Snook, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is an action by a discharged employee against the employer. In August, 1898, the appellant hired the respondent for the term of one year, at a specified rate of wages. Respondent entered into the service of the appellant and was, on November 26th, discharged and paid in full up to the time of discharge. On November 28th, the respondent brought suit against the appellant, claiming damages for breach of contract, by reason of his wrongful discharge, in the sum of \$722, which was the amount that would have been due him at the end of his term of employment, he having given credit for the amount paid him at the time of his discharge. The complaint is brief, alleging the contract of employment, which was in writing; the wrongful discharge and refusal of the appellant to allow the respondent to continue or remain in its employ; alleging faithful and efficient service on his part in every way in the performance by him of the contract; alleging that by reason of the wrongful discharge by appellant he has been damaged in the sum of \$722; and praying judgment for that amount. A demurrer was interposed to the complaint and was overruled. Objection was raised to the admission of testimony under the complaint, for the reason that it did not state a cause of action, which objection was overruled. A default was prayed for at the close of the testimony, which was also denied. Judgment was rendered for \$300. The judgment was based evidently on the salary contracted for, less the amount paid and less the salary for the time during which plaintiff had obtained other employment; he testifying that for a portion of the time

during the term for which he was employed by appellant he had obtained other employment.

It will be noticed that this suit was brought two days after the discharge of the respondent by the appellant, but it was not tried until the term of employment under the contract had expired. It is the contention of the appellant that the complaint does not state facts sufficient to constitute a cause of action, (1) because there is no sufficient allegation of damages for breach of contract, and (2) because it is not alleged, in terms, that the respondent ever offered to continue in the employment or offered to perform work for the appellant. Without setting forth in full the language of the complaint, we think it sufficiently appears that the respondent was prevented from performing his portion of the contract. Nor do we think, under the authorities as contended for by the appellant, that the recovery of the respondent should be limited to the damages accruing between the breach of the contract and the time of the commencement of the action, which in this case would be nominal, the time being only two days. There has been some conflict of authority on this proposition, and the 14 Am. & Eng. Enc. Law, p. 797, cited by appellant to sustain its contention, under the subject of "Remedies of Servant for Wrongful Discharge," is as follows:

"Where an employee for a fixed period, at a salary for the period, payable at intervals, is wrongfully discharged, he may pursue any one of four courses:

1. He may sue at once for a breach of contract, . . .
2. He may wait until the end of the contract period, and then sue for the breach.
3. He may treat the contract as existing and sue at each period of payment for the salary then due.
4. He may treat the contract as rescinded and sue

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immediately on a *quantum meruit* for the services performed. . . .”

But in the first instance it is said he can only recover ~~his damages~~ up to the time of bringing suit. In support of this ~~proposition~~ that the plaintiff can recover damages only up to the time ~~of~~ bringing suit, the following cases are cited: *Colburn v. Woodworth*, 31 Barb. 381; *Booge v. Pacific Railroad*, 33 Mo. 212 (82 Am. Dec. 160); *Nations v. Cudd*, 22 Tex. 550; *Gordon v. Brewster*, 7 Wis. 355; and many others. But these cases do not sustain the text. All that is held in *Colburn v. Woodworth*, *supra*, is that these remedies are not cumulative, and that an action upon one and judgment upon it will operate as a bar to any further action; that the error, if any, should be corrected in that action by review of the verdict or judgment and not by a new action for the same cause. The question of whether the plaintiff could recover damages only up to the time of bringing suit was not involved or discussed. *Booge v. Pacific Railroad*, *supra*, involves exactly the same proposition. In *Nations v. Cudd*, *supra*, the rule laid down in *Meade v. Rutledge*, 11 Tex. 44, and *Hassell v. Nutt*, 14 Tex. 260, that the discharged servant could maintain his action for damages immediately upon the breach of the contract by his employer, was sustained. In *Gordon v. Brewster*, *supra*, it was decided that the measure of damages was the rate of the salary from the time of the breach up to the time of the trial, less the amount plaintiff might have earned in the meantime, but that the damages could be computed and recovered only from the time of the breach up to the time of the trial. In that case the court said:

“Had the respondent seen fit to wait before bringing his action until the period had elapsed for the complete performance of the agreement, the measure of compensa-

tion would then have been easily arrived at. We suppose he would then have been entitled to the entire amount of his salary, less what he would have reasonably earned during the time covered by the remainder of the contract in laboring elsewhere. But as the case now stands, we think he was only entitled to recover his salary on the contract down to the day of trial, deducting therefrom any wages which he might have received, or might have reasonably earned in the meantime. This rule appears to us to be the most equitable and safe of any that occurs to our minds, and the one most likely to effect substantial justice between the parties."

It will thus appear that exactly the contrary doctrine was held from that announced by the learned author of the Encyclopedia, above quoted. The same rule is adopted by Sutherland on Damages (2d ed.), § 692, in which the case of *Gordon v. Brewster*, *supra*, is reviewed and the rule announced indorsed. The case of *Everson v. Powers*, 42 Am. Rep. 319, is a case exactly parallel with the case at bar. Said the court:

"The only question presented upon this appeal relates to the rule of damages to be applied in an action for a breach of a contract of employment where the servant has entered upon the performance of a contract, has been discharged, and brings his action before the expiration of the term, but the trial does not occur until afterward."

After discussing the contention which the appellant makes in this case, the court says:

"The plaintiff's cause of action arose at the time of the breach of the contract, and he was then entitled to sue and recover such actual damages as the evidence upon the trial showed he had sustained by the defendant's breach. It is the breach and not the time of complaining of it which gives the damages;"

citing Lord Mansfield to the effect:

"It is agreeable to principles of common law that

whenever a duty has incurred pending the writ, for which no satisfaction can be had by a new suit, such duty shall be included in the judgment to be given on the action already pending;”

citing, also, Sedgwick on Measure of Damages (1st ed.), 107, to the effect:

“If the original tort or breach of contract is such that the plaintiff would be entitled to nominal damages, then he can go on to give evidence of those consequences of the act which are immediately traceable to it, although they have taken place after the commencement of the suit.”

And the following from the same author (p. 122, 6th ed.):

“If there is a breach of contract, the right to nominal damages exists at once to vindicate the right, and suit may be brought. If those consequences for which the law renders the party in default responsible have developed themselves so as to create absolute injury before the verdict, the jury are bound to give compensation for such injury; but if at the time of the trial the loss is still only probable, the verdict should be for nominal damages.”

In concluding the opinion, the court in that case said:

“Where the cause of action is commenced during the term but the trial occurs after the expiration of the term of service, we can see no reason why the plaintiff may not be permitted to recover the same damages that he would have been entitled to recover had the action been commenced after the expiration of the term.”

This, we think, voices the weight of authority on this subject. It is insisted that the court erred in its first and second instructions, and should have given the instruction asked for in lieu thereof by the appellant; but we think the court's instructions were substantially as asked for by the appellant, and the court was under no obligation to incorporate the language of the appellant

into its instruction. The other instructions complained of are based upon the theory of the appellant that no damages could be recovered which had accrued after the commencement of the action, and this objection is disposed of by what we have said in relation to the sufficiency of the complaint.

No error appearing in the trial of the cause, the judgment is affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3616. Decided February 23, 1901.]

AARON KUHN, *Appellant*, v. CHARLES S. MASON *et al.*,
Respondents.

JUDGMENTS — PETITION FOR VACATION — SUFFICIENCY OF ALLEGATIONS.

Where judgment has been rendered discharging an insolvent debtor, it will not be vacated upon the petition of a creditor whose petition does not allege that he presented his claim against the estate and brought himself within the statute, so far as the duty of a creditor is concerned; nor that he is otherwise interested in the judgment rendered; nor that, in case of its vacation, the subsequent proceedings would not result in the same judgment.

SAME — VACATING — LACHES OF PETITIONER.

Although Bal. Code, § 5156, requires proceedings for the vacation of judgments to be brought within one year after their rendition, the right to grant or deny the petition is discretionary with the trial court, and its refusal to grant a petition to vacate when the year of limitation was within three days of expiration would not constitute abuse of discretion, where there is no showing of diligence on the part of the petitioner, nor of any reason why he had not proceeded earlier.

SAME — IMPROPER REMEDY FOR REVIEWING ERRORS OF LAW.

Bal. Code, § 5153, subd. 3, which authorizes a court to vacate or modify its judgment after the term at which it was rendered, for "irregularity in obtaining the judgment or order," does not contemplate that errors of law committed by the court may be

24	94
28	802
24	94
30	624
30	625
24	94
32	161
32	178
24	94
33	81
24	94
34	298
34	585
35	390

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Argument of Counsel.

corrected by motion to vacate, since the proper remedy in case of such errors is an appeal from the judgment.

Appeal from Superior Court, Whitman County.—Hon. WILLIAM McDONALD, Judge. Affirmed.

S. J. Chadwick and *William J. Bryant*, for appellant:

To determine the sufficiency of the facts alleged in any pleading they must be taken in connection with the law applicable thereto. The principle is well established, and has been adopted by this court, that the law in force at the time of the execution of a contract determines the rights of the parties with reference thereto in all proceedings affecting the same. *In re Heilbron's Estate*, 14 Wash. 536 (35 L. R. A. 602); *Swinburne v. Mills*, 17 Wash. 611 (61 Am. St. Rep. 932); *Herrick v. Niesz*, 16 Wash. 74; *Bettman v. Cowley*, 19 Wash. 207 (40 L. R. A. 815). The law governing remedies and limitations upon recoveries at a time a contract is entered into, becomes a part of the contract, and subsequent statutes affecting such contracts must be construed with reference to the prior laws, as if they were expressly referred to or incorporated in its terms. This rule goes to all questions involving the validity, construction, discharge, and enforcement. *Walker v. Whitehead*, 16 Wall. 314 (21 L. ed. 357). A state law discharging the person or the property of the debtor, and thereby terminating the legal obligation of the debt, cannot constitutionally be made to apply to debts contracted prior to the passage of the law. *Ogden v. Saunders*, 12 Wheat. 213 (6 L. ed. 606); *Brandenburg, Bankruptcy*, p. 9.

The statute regulating insolvency and bankruptcy must be strictly pursued, even though the court given jurisdiction is a court of general jurisdiction. *Muskett v. Drummond*, 10 Barn. & C. 153; *Christie v. Unwin*,

11 Ad. & El. 373; *Cohen v. Barrett*, 5 Cal. 196; *Morse v. Presby*, 25 N. H. 299; *Eaton v. Badger*, 33 N. H. 228; *Northcut v. Lemery*, 8 Ore. 317; *Ferguson v. Jones*, 17 Ore. 204 (3 L. R. A. 620, 11 Am. St. Rep. 808); *Tyler v. Reynolds*, 53 Iowa, 146; *Long, v. Hewitt*, 44 Iowa, 363.

Wyman & Neill, for respondents:

In proceedings to vacate a judgment, the petitioner must show three essential conditions to exist in turn: (1) That he is a party to the action or proceeding in which the judgment to be vacated was entered. *State ex rel. Dodge v. Langhorne*, 12 Wash. 592; *Woods v. Irwin*, 23 Am. St. Rep. 282; *Freeman*, Judgments (2d ed.), § 92. (2) That he had a beneficial interest in having the judgment vacated. Bal. Code, § 5158; *Miracle v. Lancaster*, 46 Iowa, 179; *Morton v. Coffin*, 29 Iowa, 235. (3) He must show that he proceeded with diligence.

The opinion of the court was delivered by

DUNBAR, J.—The appellant sought by petition, under the provisions of chapter 17, title 28, Bal. Code, to vacate a certain order of the court below discharging respondent Charles S. Mason, an insolvent debtor, from further liability on account of any indebtedness existing against him, and discharging the respondent, A. A. Miller, assignee, from his trust as such. The order of discharge was made on September 13, 1898, and the proceedings to vacate were commenced on September 9, 1899. A demurrer was interposed to the petition on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was sustained, and from the judgment of the court in sustaining said demurrer this appeal was taken.

The question involved is the sufficiency of appellant's petition. The petitioner was a creditor of the estate. The promissory note, the basis of the appellant's claim against respondent Mason, was executed in August, 1892. The insolvency law of 1890 (Gen. Stat. §§ 2741-2755), was then in force, and it is contended by the appellant that a creditor under a contract executed while that act was in effect is entitled to all the rights conferred by it, and that a debtor is charged with a full performance of all the requirements of that act before he can obtain a discharge in insolvency. The act of 1890 provided that no discharge could be obtained unless a showing was made that not less than fifty per cent. of the full amount of the indebtedness of the insolvent over and above all expenses of the assignment had been realized from the estate, and the contention is that the settlement must be made under the provisions of the law in effect at the time that the contract was made, and not in accordance with the provisions of subsequent enactments. It is also claimed that, even under the existing law, the report of the assignee was not sufficient. We are of the opinion that the court did not err in sustaining the demurrer to this petition, and for several reasons: First, the petition does not allege such an interest in the petitioner as would justify him in asking for an order vacating the judgment. A stranger to a judgment cannot ask for its vacation, for it is no concern of his whether the judgment be right or wrong. It is true, the petitioner alleges that he is a creditor of the estate, but he does not allege that he has presented his claims or brought himself within the statute so far as the duty of a creditor is concerned; neither does he allege such an interest in the judgment as would warrant him in applying for its vacation; nor does he allege that, if the judgment were vacated, the subsequent proceedings

would not result in the same judgment. It is true, he alleges that a certain report was not made by the assignee, which, under the statute, should have been made; but he does not allege that the report could not be made under the existing facts, and, unless the petition negatives the conclusion that a re-trial of a cause will eventuate in a different judgment, the judgment will not be vacated. Judgments are not vacated to vindicate abstract law; the proceeding is an equitable one, and cannot be invoked excepting in the aid of practical benefit. It was said by this court in *Tacoma Lumber & Mfg. Co. v. Wolff*, 7 Wash. 478 (35 Pac. 115, 755):

“It is not enough to entitle a party to have a judgment against him vacated that he should show that it had been irregularly entered; he must, in addition thereto, establish to the satisfaction of the court the fact that such judgment is unjust and inequitable as against him. Proceedings of this kind are of an equitable nature, and courts will not interfere with the judgment simply because it may have been erroneously entered, unless, in addition thereto, it is made to appear that it is unjustly burdensome to the moving party. In such a proceeding pure technicalities can have little influence upon the decision of the court, if the judgment sought to be vacated is not of such a nature that, if it were set aside, the moving party would be able to interpose a substantial defense upon a new trial, or in another proceeding involving the same cause of action.”

The right to a vacation of judgments, while it existed at common law for certain specific reasons, viz., fraud and collusion, is in this state statutory; and, if appellant brings himself within the statute at all, it is within the provisions of subd. 3, of § 1, chapter 17, title 28, Bal. Code, which provides for the vacation of a judgment for mistakes, neglect or omission of the clerk or irregularity in obtaining the judgment or order. There is no mistake,

neglect, or omission of the clerk alleged, but it is alleged that the judgment was irregularly obtained. But the irregularity provided for by the statute does not mean an irregularity such as is shown by the petition in this case, viz., that the court misconstrued the law. Irregularities which are generally invoked for the purpose of vacating a judgment, and which will justify a vacation of the judgment after term time, are where a judgment was entered in favor of the plaintiff before the time for answering had expired, or where the judgment was entered while there was an answer or demurrer on file and not yet disposed of, and other irregularities of this character.

Again, the petition does not show diligence. It is insisted by the appellant that he has met the requirements of the statute when he files his petition within a year, but such is not the voice of authority. The rule is thus announced in 15 Enc. Pl. & Pr., p. 268:

“Without regard to the provision of the statutes as to the time within which an application to vacate or set aside a judgment shall be made, it may be laid down as a general rule that, with certain exceptions—as in the case of void judgments—a party must institute such proceeding with due diligence, and his right to obtain relief against the judgment will be barred by unreasonable and unexplained laches in applying therefor”; citing a great many cases.

Neither is this an open question in this state, for in *Bozzio v. Vaglio*, 10 Wash. 270 (38 Pac. 1042), it was said by this court:

“Appellant contends that said petition ought not to have been granted because the same was not diligently prosecuted, it appearing from the petition that respondent became aware of said judgment on the 16th day of May following its rendition, while his proceeding to vacate the same was not brought until in November there-

after. Respondent contends that he was entitled to a year after the rendition of such judgment within which to bring the proceedings in question. Sec. 1395 provides that such proceedings must be commenced 'within one year after the rendition of the judgment,' etc. We are of the opinion, however, that the party seeking to have a judgment set aside must nevertheless proceed with diligence within the year allowed. But this question of diligence is addressed to the discretion of the lower court, and we are not prepared to say that the action of the court in entertaining the petition several months after the respondent became aware of the judgment, was an abuse of discretion under the circumstances of this case, as it appears that a prior application had been made to have such judgment set aside, which, however, was not acted upon, the court sustaining an objection raised by the appellant thereto of a want of jurisdiction to entertain it, in consequence of some defect in the proceedings."

Thus it will appear that, while in that case this court sustained the lower court in its action in granting the motion to vacate the judgment, it did so because, under the circumstances of that case,—which it will be observed are not similar to the circumstances in this case,—it was found that the court did not abuse the discretion vested in it. And certainly, under the doctrine announced there, we are not able to find that the court abused its discretion in this case in not granting the petition to vacate when the year of limitation was within three days of expiration, without any showing of diligence whatever, or any reason why the petition had not been made before. It is not the policy of the law to disturb judgments, after a long time has elapsed, without good reason being shown for such delay. In addition to this, it is not the intention of the law that the motion to vacate shall take the place of an appeal, and, under the provisions of this petition, if the court did not act in accordance with the law, its failure

Feb. 1901.] Opinion of the Court—DUNBAR, J.

was purely error, which ought to have been appealed from. The irregularity contemplated by the statute is not an error which the court may make in construing statutes or in passing upon grave questions of constitutional law. On this question also this court has spoken. We decided in *Dickson v. Matheson*, 12 Wash. 196 (40 Pac. 725), that error of law committed by the court in including attorney fees in a judgment against a partnership could not be corrected by petition to vacate the judgment, when no fraud has been practiced upon the court, but must be reached by appeal. In that case it was said:

"No fraud was practiced, and, at most, there was simply error of law upon the part of the court in giving judgment for the amount claimed as attorney's fees. But we do not think that a petition to vacate the judgment is the proper proceeding for the purpose of correcting an error of law, and the statute which authorizes proceeding by petition to vacate and modify a judgment in the court in which it is rendered does not include an 'error of law' within the causes for which such proceedings may be taken. The final judgment pronounced upon a hearing upon the merits cannot be set aside by the petition under the statute for mere error into which the court may have fallen;"

citing Black on Judgments, § 329, where that author says:

"It is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen. That a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or *certiorari*, according to the case, but it is no ground for setting aside the judgment on motion."

The judgment is affirmed.

REAVIS, C. J., and ANDERS, J., concur.

FULLERTON, J., not sitting.

[No. 3677. Decided February 25, 1901.]

CANADIAN AND AMERICAN MORTGAGE & TRUST COMPANY,
LIMITED, *Respondent*, v. BENJAMIN W. BLAKE *et ux.*,
Appellants.

MORTGAGE FORECLOSURE—REDEMPTION PERIOD—OCCUPATION OF
PREMISES BY DEBTOR—CONSTITUTIONAL LAW.

LAWS 1899, p. 93, § 15, which provides that in case of the sale on execution of any homestead occupied for that purpose, the judgment debtor shall have the right to retain possession thereof during the period of redemption without accounting for issues or value of occupation is unconstitutional as to foreclosure sales under mortgages executed prior to its passage, when the law in force gave the purchaser on foreclosure sale the right of possession from the day of sale.

Appeal from Superior Court, Lewis County.—Hon.
HENRY S. ELLIOTT, Judge. Affirmed.

M. A. Langhorne (*W. W. Langhorne*, of counsel), for
appellants.

J. E. Willis, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This was an action by respondent against appellants to foreclose a mortgage. The mortgage was executed February, 3, 1893, and suit to foreclose the same was commenced on the 2d day of May, 1899. The court decreed that the purchaser was entitled to immediate possession of the land to be sold, after sale. From this portion of the decree this appeal is taken.

The trial court held that § 15, ch. 53, Laws 1899, which provides that, in case of any homestead occupied for that purpose at the time of sale, the judgment debtor shall have the right of redemption without accounting for issues or value of occupation, was unconstitutional

when applied to contracts executed prior to its passage. It is claimed that the decision by this court of the case of *Wilson v. Wold*, 21 Wash. 398 (58 Pac. 223), is decisive of the question involved in this appeal. That case does not seem to us to reach the question under discussion here. There there was no lien existing; it was simply a contract for money to be paid, and it was held that the law which provided that judgment debtors should be entitled to possession, and to the rents, issues, and profits of real property which was sold on execution, did not deprive a party who had sued upon an open account of any right or the enforcement of any remedy which the prior law had given him. But in this case the contract is with special reference to the property upon which the lien is established by the contract. We think the principles underlying this case have been decided by this court in the case of *Bettman v. Cowley*, 19 Wash. 207 (53 Pac. 53, 40 L. R. A. 815), and more directly in *Swinburne v. Mills*, 17 Wash. 611 (50 Pac. 489, 61 Am. St. Rep. 932), where the authorities which distinguished between a simple remedy, which it is within the legislative power to change, and a remedy which is a part of the obligation of the contract, a change of which can not be made without impairing and lessening the value of the contract, were collated and discussed at length. A re-discussion of these principles would not be beneficial. But we will refer again to one of the cases cited in *Swinburne v. Mills*, *supra*, viz., *Barnitz v. Beverly*, 163 U. S. 118, where the supreme court of the United States, after an exhaustive review of the questions involved, decided that a state statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly al-

lowed, cannot constitutionally apply to a sale under a mortgage executed before its passage. As to existing contracts, the law of 1899 was unconstitutional and void.

The judgment is affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 8048. Decided February 26, 1901.]

JAMES DUNSMUIR, *Respondent*, v. PORT ANGELES GAS, WATER, ELECTRIC LIGHT AND POWER COMPANY *et al.*,
Defendants, A. P. BURWELL, *Trustee*, *Appellant*.

APPEAL — BRIEFS — COMPLIANCE WITH COURT RULES.

Failure to comply literally with the requirements of rule 8 of the supreme court, which provides that briefs shall contain a clear statement of the case, as far as deemed material, with references to the pages of the transcript for verification, and shall include the findings of fact made by the court, with the exceptions thereto, on which any question is sought to be raised on appeal, is not ground for striking the brief, when such requirements have been substantially complied with by the appellant.

CHATTEL MORTGAGES — CONSTRUCTIVE NOTICE — RECORDING IN WRONG RECORD — WATER WORKS SYSTEM — WHEN PERSONAL PROPERTY.

A water works plant and system, with its pipes, mains, fixtures, rights, privileges and franchises, are personal property when the land to which they are attached does not belong to the water works company, and it has but a limited easement in the streets and lands through which its pipes are laid for the delivery of water; and a mortgage thereof, when recorded in the record of real estate mortgages, instead of that of chattel mortgages, does not afford constructive notice, under Bal. Code, §§4558, 4559, which provide that a mortgage of personal property is void as against creditors of the mortgagor, or subsequent purchasers or incumbrancers for value and in good faith, unless acknowledged and recorded in the office of the county auditor of the county in which the property is situated, in a book kept exclusively for that purpose.

Feb. 1901.] Opinion of the Court.—ANDERS, J.

TAXES—PAYMENT BY MORTGAGEE OF PERSONAL PROPERTY—LIENS.

The holder of a chattel mortgage upon personalty, who pays delinquent taxes thereon acquires no additional lien thereby, by virtue of Laws 1891, p. 322, §109, which provides that any person who has a lien, by mortgage or otherwise, upon any real property on which the taxes have not been paid, may pay such taxes, and the same shall constitute an additional lien.

Appeal from Superior Court, Clallam County.—Hon. JAMES G. McCLINTON, Judge. Reversed.

Ira Bronson and R. C. Wilson, for appellant.

W. L. Marquardt and George C. Hatch, for respondent. .

The opinion of the court was delivered by

ANDERS, J.—The respondent moves to strike appellant's brief in this case for the alleged reasons: (1) That appellant has failed to print in his brief the findings of fact and conclusions of law made by the lower court; and (2) that appellant has also failed to refer in his brief to the record by page, as required by the rules of this court. Rule 8 of this court provides that briefs shall contain a clear statement of the case, so far as deemed material by the party, with reference to the pages of the transcript for verification; and that in equity causes and actions at law tried by the court without a jury, the party or parties appealing shall print in their brief the findings of fact, with the exceptions thereto, on which any question is sought to be raised by them on the appeal. Although these provisions have not been literally complied with by appellant, they have been substantially observed, and the motion to strike is therefore denied.

This action was instituted by the respondent to foreclose a mortgage on a system of water works in Port

Angeles, alleged to have been executed to respondent by the Port Angeles Gas, Water, Electric Light & Power Company, Limited, to secure the payment of a promissory note made by said company for \$20,000, dated February 21, 1891, and payable one year thereafter; and also to foreclose a mortgage on certain real estate situated in Port Angeles, executed by defendants C. E. Mallette and wife, as further security for the payment of said promissory note. The complaint alleges the due incorporation, under the laws of this state, of the Port Angeles Gas, Water, Electric Light & Power Company, Limited; that on the 21st day of February, 1891, said corporation was the owner of, and engaged in operating at Port Angeles, Washington, a system of water works for the purpose of supplying the inhabitants of Port Angeles, a municipal corporation of the fourth class, with water, and which said system of water works consisted of a reservoir or dam on a stream of water flowing through said town, commonly known as "Frazier's Creek," with pipes or mains leading therefrom through, over, and under the streets, alleys, and other public places of said town, to the dwellings of the inhabitants thereof, through which pipes and mains said water flowed by gravity, together with the right to said flowing water in said stream by appropriation, and a franchise from said town permitting it to so lay its pipes and mains and operate said system of water works therein, with certain tools and fixtures, altogether constituting its system of water works or plant; the making and delivery of the said note and the executing of the said mortgage, copies of which note and mortgage are set out in full therein; that said mortgage was duly recorded in the office of the auditor of Clallam county, Washington, on March 7, 1891, and indexed direct and reverse; that the plaintiff

paid taxes levied on said water plant, aggregating the sum of \$2,931.40, for the protection of his mortgage lien; that no part of said note, except \$5,000 of the interest thereon, has been paid, and that no part of said taxes has been paid; that the Angeles Water Company is a corporation duly organized under the laws of this state; and that said Angeles Water Company and the defendant, A. P. Burwell, as trustee, claim some interest in the property covered by plaintiff's mortgage; and that said claim, if any they have, is subordinate to the lien of plaintiff's mortgage. Judgment is demanded in the complaint against the Port Angeles Gas, Water, Electric Light & Power Company, Limited, for the amount due on said note, and for said taxes, interest, attorney's fees, and costs; that the said mortgage be adjudged to be a first lien on all of said mortgaged property, and that the same be sold and the proceeds thereof be applied in payment of the amount due plaintiff.

The mortgagor, the Port Angeles Gas, Water, Electric Light & Power Company, Limited, was served with summons, and defaulted, and the Angeles Water Company seems to have made no defense. The defendant Burwell, in his answer, denied the allegations of the complaint, except that the two defendant companies were corporations, and alleged affirmatively, certain facts showing the invalidity of the plaintiff's note and mortgage, and averred, in effect, that in June, 1892, the Angeles Water Company became the owner of the water works, rights, and privileges of the Port Angeles Gas, Water, Electric Light & Power Company, Limited, mentioned in plaintiff's complaint, by purchase from one C. E. Mallette, who purchased the same from the last mentioned company; that the said Angeles Water Company issued forty bonds of \$1,000 each, and, to secure

the payment thereof, executed and delivered to a trustee a certain deed of trust or mortgage of the property described in plaintiff's complaint, and other property in said deed of trust or mortgage described; that the said trust deed or mortgage was executed as a chattel mortgage and was recorded in the office of the auditor of Clallam County, both in the records of real estate mortgages and in the records of chattel mortgages; that said bonds were delivered as collateral security for the payment of certain notes made by said Mallette, and sold for the benefit of the said Angeles Water Company, and that the proceeds thereof were received by said company; that none of said notes had been paid and that no part of said bonds had been paid, except the interest thereon up to June 1, 1894; that the Angeles Water Company surrendered possession of the property mentioned in plaintiff's complaint and in the said trust deed or mortgage to the trustee; that the said Angeles Water Company duly appropriated the water of said Frazier's Creek after it purchased said property; that none of the purchasers of said bonds or of said notes, or any agents or attorneys of any of said purchasers, had, at the time of such purchase, any knowledge or notice of plaintiff's mortgage, and that the trustee named in said deed of trust or mortgage had no knowledge or notice of the mortgage of plaintiff at the time he received said trust deed or mortgage. And the defendant Burwell demanded judgment against the Angeles Water Company for the amount due on said bonds and for the foreclosure of said trust deed, etc. The new matter pleaded in the answer was denied by the reply. The plaintiff obtained judgment against his mortgagor in accordance with the prayer of the complaint, and a decree foreclosing the mortgage as a paramount lien on the prop-

erty described in the complaint, together with the usual order of sale. Judgment was also rendered in favor of defendant Burwell, as trustee, and against the defendant Angeles Water Company, establishing and foreclosing the trust deed. From the judgment and decree in favor of the plaintiff the defendant Burwell has appealed.

It appears from the record that the Port Angeles Gas, Water, Electric Light & Power Company, Limited (hereinafter designated as the "first company," was incorporated, under the laws of the state of Washington, in the year 1890. In November, 1890, the town of Port Angeles granted to C. E. Mallette, his associates, successors, and assigns, by ordinance, the right for twenty-five years to construct, operate, and maintain water works in said town, and to supply the town and its inhabitants with water, with the right to lay, relay, connect, disconnect, and repair its mains and pipes along, through, under, and over the streets, alleys, wharves, and other public places in said town. And it was provided in the ordinance that the town should have the right to purchase the plant after five years at a price to be fixed by appraisers. Prior to February 21, 1891, the date of the respondent's note and mortgage, said franchise was transferred by said Mallette to the first company, the respondent's mortgagor. On said February 21, 1891, the first company had commenced the construction of its water works, the same being the only water plant ever constructed at Port Angeles. On that date the mains and pipes had been purchased for the plant and were in the possession of the company, but only a portion of the mains had been laid; and the dam subsequently constructed on Frazier's Creek for the purpose of storing the water of said stream and of divert-

ing it into the company's mains had not then been erected, although the company had made preparation for its construction. This dam was constructed some distance south of the corporate limits of the town, upon a section of school land owned by the state, and no other dam has ever been constructed or used for the purpose of supplying water for the plant by either of said companies. No permission or authority was ever obtained, in writing or otherwise, from the state, for the construction or maintaining of said dam, or for laying or maintaining the pipe line of said water works through said school lands. The pipe line, when constructed, extended northerly from the dam, and said school land, over the premises of private parties. No deed of right of way was ever obtained by the first company from any of the persons whose lands were crossed by the pipe line; no proceedings were ever had to condemn the water in said stream, or the right of way for the pipe line, and no compensation was ever paid for the same, and no contract was ever made therefor. And it does not appear that the first company ever owned any land in any way connected with its water plant. On the 1st day of June, 1891, the principal mains of the plant were permanently connected together and buried in the ground, and connected with various buildings in Port Angeles, and on that day water was turned into the mains and pipes, and thereafter flowed therein by force of gravity. On March 31, 1892, the first company, for a valuable consideration, sold and conveyed to C. E. Mallette, the property described in the respondent's mortgages, and on the same day said Mallette sold and conveyed the same to the Angeles Water Company, which company executed and delivered the trust deed or mortgage to secure the payment of its bonds, as stated in the answer and so-called "Cross-complaint" of ap-

pellant. Neither the bonds nor the notes which they were given to secure were paid, and prior to the commencement of this action the Angeles Water Company delivered to appellant Burwell, as successor of the original trustee, full possession and control of the water plant and other property of said company, and said trustee held such possession and control at the time of the trial of this action. A lot of mains, pipes, etc., which were purchased by the first company for the plant were never used in said plant, but are now stored at Port Angeles, and seem to be claimed by both the respondent and the appellant as covered by their respective mortgages.

Although the record in this case is quite voluminous, and many errors are assigned by appellant in his brief, the real points argued and relied on by appellant as grounds for a reversal of the judgment are not numerous. The material errors alleged are: (1) That plaintiff (respondent) failed to prove that he loaned or advanced any money to the first company; (2) that the note and mortgage set out in the complaint are defective and insufficient to give constructive notice to appellant Burwell, or to any one; (3) that said mortgage was not recorded in a volume kept exclusively for the recording of mortgages of personal property and was not indexed as required by law; and (4) that said note and mortgage were not authorized by said company through its board of trustees, or at all. It is conceded by the respondent that the trustee named in the mortgage or trust deed executed by the Angeles Water Company had no actual notice or knowledge of respondent's mortgage, and it therefore follows that, if the said trustee was not charged with constructive notice thereof, the trust deed, having been given for a valuable consideration, must be deemed a valid and prior lien upon the property described therein.

Our statute provides that a mortgage of personal property is void as against creditors of the mortgagors or subsequent purchasers and incumbrancers of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith and without any design to hinder, delay, or defraud creditors, and is acknowledged and recorded in the same manner as is required by law in conveyance of real property. 1 Hill's Code, § 1648; Bal. Code, § 4558. And it is further provided that such mortgage must be recorded in the office of the county auditor of the county in which the property is situated, in a book kept exclusively for that purpose. 1 Hill's Code, § 1649; Bal. Code, § 4559. The respondent's mortgage, it is conceded, was recorded in the records of real estate mortgages only; and if, as appellant contends, it is a mortgage of personal property, the record imparted no notice to appellant, and it will not be necessary to determine any question other than that presented by the third assignment of error.

It is a rule almost without exception that a mortgage or other instrument which is entitled to registration must, in order to be effective as notice to third persons, be recorded in the book prescribed by law. *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 16 Wash. 499 (48 Pac. 333, 737); *Hinchman v. Point Defiance Ry. Co.*, 14 Wash. 349 (44 Pac. 867); Webb, Record of Title, § 252.

The mortgage which the respondent is seeking to foreclose is set forth in the complaint as a part thereof. It recites that the said mortgagor mortgages to the mortgagee the following described *personal property*, to wit: "All its water pipes, mains, fixtures, plant, and any and all its property now placed and to be placed in its water

system, together with all rights, privileges, securities, and franchises" of the mortgagor. The complaint then alleges that the said mortgage was acknowledged, and was accompanied by the affidavit of the mortgagor that it was made in good faith and without any design to hinder, delay, or defraud creditors, and that it was recorded, etc. From the language of the mortgage and the allegations of the complaint it would seem that the respondent, at the time of the commencement of this action, considered the instrument in question a mortgage of personal property, in all respects, in accordance with all the statutory requirements. But it is now insisted by the learned counsel for the respondent that this is a real estate, and not a chattel, mortgage, and that it was properly executed and recorded as such. No part of the mains and pipes covered by respondent's mortgage was connected with Frazier's Creek, or used for the purpose of conveying water, at the time the mortgage was made; and, as the greater portion thereof was neither laid in the ground nor connected together at that time, it can hardly be doubted that at least the unconnected portion, if not the whole, was in fact personal property, and properly so considered by the parties to the mortgage. Being personal property at the time they were mortgaged, by what means, or upon what principle, have these water pipes and mains been transmuted into real estate? We do not understand that the learned counsel for the respondent claims that they really became fixtures by reason of their having been laid under ground or through the streets of the city; for, if it be true that they thereby became fixtures, the ownership thereof was thus transferred to the proprietor of the land to which they were affixed, which the respondent does not concede. It is true that this property was so imbedded in the soil that,

under ordinary circumstances, it might have been deemed a fixture; but such annexation did not necessarily change its character, or relieve the respondent from the duty of properly recording his mortgage.

"A mortgage of articles that are afterwards so annexed or affixed to real estate as to ordinarily constitute fixtures must be recorded as a chattel mortgage, and the fact that under this construction the examination of title to realty will necessarily involve an examination of the chattel mortgage record, does not change the rule." Webb, Record of Title, § 252; and see cases cited.

The real contention on the part of the respondent seems to be that the water works, as constructed and operated, must be deemed real estate by reason of its fixed locality; or, in other words, because it is immovable, and, hence, according to the law as announced by Blackstone, real estate. It is not claimed, as we have already intimated, that the pipes and mains, separately considered, are fixtures and therefore real property, but it is insisted that the "plant" as a whole is real estate, for the reason, as stated in the brief of counsel, that "the principal thing in a water works is the water, and it is as immovable and fixed as the land." This statement as to the character of property in water cannot be accepted as strictly accurate. While it is true that water in a running stream is deemed in law a part of the land over which it flows, it is also true that, after it has been diverted from its original channel and conveyed elsewhere in pipes for distribution or sale, it loses its original character and becomes personal property. *People ex rel. Heyneman v. Blake*, 19 Cal. 579; *Parks Canal & M. Co. v. Hoyt*, 57 Cal. 44.

Counsel for the respondent has cited cases holding that telegraph lines and telephone lines and electric light poles

and wires are real estate, under statutes relating to taxation or to mechanic's liens; and also a case from California holding that a mining right on public land is real estate (*Merritt v. Judd*, 14 Cal. 63); and still another case from the same state, in which it was held that a flume with running water was realty (*Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620). In *Keating I. & M. Co. v. Marshall Electric L. & P. Co.*, 74 Tex. 605 (12 S. W. 489), cited by respondent, the court held that the electric light poles, wires, etc., were real estate and subject to mechanic's liens, because it was impracticable to separate them from "the lot and improvements thereon" owned by the company. And to the same effect is *Hughes v. Lambertville Electric Light, H. & P. Co.*, 53 N. J. Eq. 435 (32 Atl. 69), also cited by respondent. Neither of these cases is applicable to the facts in the case at bar, it being conceded, or at least not denied, that the first company owned no lots or buildings to which its pipes and mains were appurtenant. In *Merritt v. Judd*, *supra*, the court held that a claim to public mineral land—a quartz lead—was practically a freehold estate, though it recognized the fact that in so deciding it departed from the technical rules of law. The decision was, in effect, based on the doctrine of *stare decisis*, the court observing in the course of the opinion that, "from an early period of our state jurisprudence, we have regarded these claims to public mineral lands as titles." After stating the reason why the courts of the state had given mining claims the recognition of legal estates of freehold, the court in that case said:

"If to decide thus, be a departure from some technical rules of law, it is but following other rules, which hold that a system of decisions, long established and long acted upon, shall not be departed from when important rights

have vested under it, merely because the reasons upon which it rests might not, in the judgment of subsequent judges, be considered sound."

In *Union Water Co. v. Murphy's Flat Fluming Co.*, *supra*, the court held that the sluice and flume, in that case, which was used for mining purposes, was in the nature of real estate, and the mortgage upon it included all improvements then upon the line of the work and also all those afterwards put thereon; but it does not appear that there was any question made by the parties to the action as to the character of the property, or that there was any agreement or understanding as to its character, between the parties to the mortgage there under consideration, such as appears in the case at bar. And, moreover, it appears that in California miner's flumes and ditches are declared by statute to be real estate. Deering's Code Civil Proc., § 657 *et seq.*

In *Western Union Tel. Co. v. State*, 40 Am. Rep. 99, cited by respondent, it was held that the telegraph line was taxable, under the statute of Tennessee, as real estate. In disposing of the question, the court said:

"We treat the telegraph line as partaking of the nature of realty, in analogy to the now settled doctrine that railroads and rolling stock . . . are so treated."

The case, however, which seems to be principally relied upon by respondent as supporting the judgment of the court below is that of *Appeal of North Beach & M. R. R. Co.*, 32 Cal. 500. In that case the board of supervisors of the city and county of San Francisco were authorized, by an act of the legislature, to widen Kearney street in said city, and proceedings for that purpose were instituted by the board. By the provisions of the statute the board were authorized to assess the expenses of the work upon the owners and occupants of houses

and lands and railroad corporations and companies that might be benefited thereby. The sum of \$20,000 was assessed against the street railway company, as its just proportion of the expenses of the work, and the assessment was confirmed by the county court. From the order of confirmation the company appealed. The order of confirmation was sustained in the supreme court by a majority opinion (SANDERSON and RHODES, JJ., dissenting), on the ground that the estate of the railroad company in the street was real property and benefited by the improvement. The court in that case seems to have concluded that the railroad company was, by the legislature, vested with an easement in fee in the street—a freehold interest—and that that, in connection with its line of track, was real estate. Some weight was also given, in the opinion of the court, to the fact that the interest of the railroad company was local,—fixed to the particular street,—and could not be enjoyed beyond or independent of that fixed locality. But the principles announced by the learned court in that case—conceding them to be correct—are not strictly applicable to the present one. In this case the first company did not have an easement in fee in the street or in any other land at the time it made its mortgage to the respondent. Its license to use the street, or its easement therein, was limited to a definite time, and was therefore less than a freehold. It was a chattel real and subject to the rules relating to personal property. 1 Schouler, Personal Property (3d ed.), § 20. If it had been the owner of lands and buildings with which its pipes and mains were connected, such pipes and mains would have been deemed a part of the realty in the nature of appurtenances or fixtures, in accordance with the rule laid down in *Appeal of Des Moines Water Co.*, 48 Iowa, 324, and

Monroe Water Co. v. Township of Frenchtown, 98 Mich. 431 (57 N. W. 268). See, also, *Commonwealth v. Lowell Gas Light Co.*, 12 Allen, 75; *Fall River v. County Commissioners*, 125 Mass. 567; *Keating I. & M. Co. v. Marshall Electric L. & P. Co.*, *supra*, and *Hughes v. Lambertville Electric Light, H. & P. Co.*, *supra*. In *Memphis Gas Light Co. v. State*, 6 Cold. 310 (98 Am. Dec. 452), it was held that pipes laid through the streets of the city; by permission of the corporate authorities, did not become a part of the realty, but were personal property, and the property of the company. Upon the facts presented by the record we are of the opinion that the property described in respondent's mortgage was and is personal property; and it therefore follows that the learned trial court erred in adjudging that the lien of said mortgage is prior and paramount to that of appellant's trust deed or mortgage.

It is stipulated by the parties hereto that the property involved in this controversy was assessed for the years 1892, 1893, and 1894, pursuant to law, as personal property; that the taxes assessed thereon became delinquent; that the said property was advertised for sale by the county treasurer; and that the respondent, for the purpose of protecting his claim and lien, paid the full amount of the taxes levied upon the property. It seems that respondent also paid the taxes on the water plant for subsequent years, and the sums so paid were adjudged a lien upon the property assessed by virtue of § 109, p. 322, Laws 1891, which provides that any person who has a lien, by mortgage or otherwise, upon any real property on which the taxes have not been paid, may pay such taxes, and that the same shall constitute an additional lien. As this provision relates to liens upon real property only, the payment of the taxes by respondent

ent created no lien in his favor; and, although it would seem that those who were benefited thereby are morally bound to repay the same to the respondent, no judgment can be rendered therefor in this proceeding.

Having concluded that the lower court erred in declaring respondent's mortgage to be a first lien on the property described therein, other than the suburban lots therein mentioned and described, that part of the judgment and decree is reversed, and the cause remanded with directions to enter a judgment and decree establishing and declaring appellant's trust deed or mortgage to be a prior and superior lien to that of respondent's mortgage.

REAVIS, C. J., and FULLERTON and DUNBAR, JJ., concur.

[No. 3751. Decided February 27, 1901.]

JENNIE CAMERON SHANNON *et al.*, Respondents, v. CONSOLIDATED TIGER AND POORMAN MINING COMPANY, Appellant.

APPEAL — NOTICE — DESCRIPTION OF JUDGMENT.

A notice of appeal which recites "that the defendant in the above entitled action hereby appeals from the judgment made and entered herefn against the defendant on the 24th day of July, 1900, to the supreme court of the state of Washington, and from the whole and every part thereof," is sufficient, although the judgment was signed by the judge July 16th, but not filed and entered by the clerk till July 24th, when there was but one judgment in the case, and the respondent could not have been misled.

SAME — BOND — TIME OF FILING.

Under Bal. Code, § 6505, which provides that the appeal bond may be filed with the clerk "at or before the time when the notice of appeal is given or served," a bond filed on August 25th was in

24 119
124 287

24 119
28 386

24 119
30 103
30 295

24 119
32 588
32 584

24 119
33 314

24 119
34 39
34 474

24 119
40 288

24 119
42 133

due time, when notice of appeal was given on August 24th and filed on the next day.

SAME — REFERENCE TO JUDGMENT APPEALED FROM.

An appeal bond sufficiently describes the judgment when it refers to it as having been made on July 16th, when it was in fact signed by the judge on that date, but not entered by the clerk until July 24th—there being but one judgment in the case.

SAME — SUFFICIENCY OF BOND — DESCRIPTION OF OBLIGEE.

An undertaking given on appeal, intended both as an appeal bond and a supersedeas bond, which undertakes "that the appellant will satisfy and perform the judgment appealed from," is sufficient, without mentioning the name of the obligee with particularity.

CONTINUANCE — SUFFICIENCY OF SHOWING MADE.

A motion for a continuance was properly denied, when the affidavit in support thereof failed to set out the evidence on account of the absence of which the motion was made, and there was no showing that the absent witness would be present at a later trial or that he could be found, or his evidence produced at the trial.

GUARDIAN AD LITEM — APPOINTMENT OF NON-RESIDENT.

Where a non-resident parent and minor children submit themselves to the jurisdiction of this state by instituting a joint action in one of its courts, it is not error for the court to appoint the parent as guardian *ad litem* for such minors, since Bal. Code, § 4832, provides that when an infant is a party, if he has no guardian, the court shall appoint one to act, and there is no provision requiring a guardian *ad litem* to be a resident of the state.

MASTER AND SERVANT — NEGLIGENCE — WHETHER MASTER'S OR FELLOW SERVANT'S — INSTRUCTIONS.

In an action for damages caused by the accidental discharge of a missed blast, in which it became a question for the jury as to whether the "boss" or "pusher" of a shift of workmen was a vice principal or a co-laborer with plaintiff's intestate, an instruction is not erroneous when it charges the jury that "persons working together in a common general employment may be fellow servants with regard to that general employment, and yet it might be under the circumstances that one of them could be a principal or master with regard to some particular part of that employment." As an illustration, "it might be that a shift working in a shaft would be fellow servants with regard to driving

Feb. 1901.]

Argument of Counsel.

holes, blasting, mucking out, and yet it might be that the principal or master could have delegated to one of them the duty of seeing that all the blasts were discharged, and that there were no missed holes left when the succeeding shift should come on to work. So that as to that particular duty, if the principal should have assumed that duty, . . . then the principal could have delegated that particular duty to one of those who were engaged as a fellow servant in the other duties mentioned," since such instruction, taken together with others given on the same subject, should be construed as meaning that, if the jury found from the evidence that the pusher on each shift had been appointed by the defendant to look for hidden or unusual dangers not inherent in the work, and not to be anticipated in the labor in which deceased was employed, and to report the same to those working with and under him, then he was a vice principal, and his negligence would be imputed to the defendant.

SAME — DUTY TO PROVIDE SAFE PLACE TO WORK.

Where the men engaged in sinking a shaft in a mine were divided into three eight-hour shifts, and one man on each shift was known as a "pusher," doing the same work as his fellows, but having general direction of the work of his shift, and charged by the master with the duty of notifying the on-coming shift of any "missed holes" of undischarged dynamite, the failure of the pusher of an out-going shift to notify the on-coming shift of the existence of a missed hole, was the negligence of the master and not that of a fellow servant.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

John R. McBride, M. A. Folsom and Heyburn, Heyburn & Doherty, for appellant:

If the servant has notice of the general danger—a danger which is constantly recurring—the master is not charged with the duty of notifying the servant of each particular defect. *Chesapeake & O. Ry. Co. v. Hennessey*, 96 Fed. 713; *Hermann v. Port Blakely Mill Co.*, 71 Fed. 853. Where the furnishing and preparation of the place is itself part of the work which the servant is employed to do, the master is not charged with any duty; and if,

while so furnishing and preparing such place, the servant is injured, he cannot recover. Where conditions are constantly changing there is no liability. As is often said, "The servant in a mine assumes the risks incident to the work in front of him." The above principles are supported by the following cases, many of which were cases of accidents from missed shots: *Browne v. King*, 100 Fed. 561; *Anderson v. Daly Mining Co.*, 50 Pac. 815; *Kenney v. Shaw*, 133 Mass. 501; *Mast v. Kern*, 54 Pac. 950; *Callan v. Bull*, 45 Pac. 1017; *Consolidated Coal Co. v. Clay's Admr.*, 51 Ohio St. 542 (38 N. E. 610); *Lindvall v. Woods*, 41 Minn. 212 (42 N. W. 1020, 4 L. R. A. 793); *Kelley v. Fourth of July Mining Co.*, 41 Pac. 275; *Deep Mining, etc., Co. v. Fitzgerald*, 43 Pac. 210; *Hogan v. Henderson*, 26 N. E. 742; *Martin v. Atchison, T. & S. F. R. R. Co.*, 166 U. S. 399 (41 L. ed. 1051); *Quinn v. New York, N. H. & H. R. R. Co.*, 55 N. E. 891; *Bunt v. Sierra Butte Gold Mining Co.*, 138 U. S. 483 (34 L. ed. 1031); *Gulf, C. & S. F. Ry. Co. v. Jackson*, 65 Fed. 48; *Finallyson v. Utica Mining & M. Co.*, 67 Fed. 509; *Ingebregsten Case*, 31 Atl. 619; *Week v. Fremont Mill Co.*, 3 Wash. 629; *Sayward v. Carlson*, 1 Wash. 29; *Hoffman v. American Foundry Co.*, 18 Wash. 287.

Robertson & Miller, for respondents:

The servant assumes none other than usual risks, unless the unusual risks are open, visible, known to and comprehended by him. *Nadau v. White River Lumber Co.*, 76 Wis. 120 (20 Am. St. Rep. 29); *Fort Hill Stone Co. v. Orm's Admr.*, 84 Ky. 183; *Pidcock v. Union Pacific Ry. Co.*, 1 L. R. A. 131; *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642 (29 L. ed. 755). Employee may continue work, where the danger is not flagrant.

Dwyer v. St. Louis & S. F. R. R. Co., 52 Fed. 89; *New Jersey & N. Y. R. R. Co. v. Young*, 49 Fed. 723.

It is the duty of the master to inspect the appliances, and the servant upon whom the master devolves its performance represents the master in that respect, and is not, in the discharge of that duty, a fellow servant of the employee injured. *Bennett v. Northern Pacific R. R. Co.*, 13 L. R. A. 467; *Fay v. Minneapolis & St. L. Ry. Co.*, 30 Minn. 231; *International, etc., Ry. Co. v. Kernan*, 78 Tex. 294 (9 L. R. A. 703); *Condon v. Missouri Pacific Ry. Co.*, 78 Mo. 567; *Bushby v. New York, L. E. & W. R. R. Co.*, 107 N. Y. 374 (1 Am. St. Rep. 844); *Ell v. Northern Pacific R. R. Co.*, 48 N. W. 222 (12 L. R. A. 97, 26 Am. St. Rep. 621); *Braun v. Chicago, R. I. & P. R. R. Co.*, 36 Am. Rep. 243; *Louisville, etc., R. R. Co. v. Utz*, 133 Ind. 265; *Hopkins v. O'Leary*, 57 N. E. 342; *Burke v. Anderson*, 69 Fed. 814; *Kelly v. Cable Co.*, 7 Mont. 70; *Anderson v. Bennett*, 19 Pac. 765 (8 Am. St. Rep. 311). It is the duty of the master to search for latent defects. *Little Rock, etc., Ry. Co. v. Leverett*, 48 Ark. 333; *Devlin v. Wabash, etc., Ry. Co.*, 87 Mo. 545.

The opinion of the court was delivered by

MOUNT, J.—This is an action for damages arising out of personal injuries which were received by and resulted in the death of Joseph Shannon, husband of the plaintiff Jennie C. Shannon, and father of the minor plaintiffs above named. The injury occurred in a mine of defendant at Burke, Idaho, on February 14, 1898, by an explosion of dynamite. The deceased, Shannon, was engaged as a miner, on what is termed a "shift," with three others, in sinking a perpendicular shaft in defendant's mine. This shaft was six feet wide north and

south, by fifteen feet long east and west, and about forty feet below the level, fifteen hundred feet below the surface. Engaged in this work were three eight-hour shifts, consisting of four men each. One of the men comprising each shift was what was called a "boss" or "pusher," who had general direction of the work of his shift, directing the men where and how to work, and furnishing materials, tools, and supplies, and who did the same work as his fellows. The shift of which deceased was a member consisted of Murphy, Shannon, Robinson, and Cassidy; Murphy being the boss or pusher. The next shift consisted of Berg and three others; Berg being the boss or pusher. The other shift consisted of Bray and three others; Bray being the boss or pusher. Each shift was known and designated by the name of the boss. The Murphy shift began work each day at 7 a. m. and quit at 3 p. m. The Berg shift began at 3 p. m. and quit at 11 p. m. The Bray shift began at 11 p. m. and quit at 7 a. m. On the 13th day of February, 1898, the Murphy shift, in the discharge of their duties, had drilled with machine drills seventeen holes in the bottom of the shaft to the depth of about six feet, leaving one hole undrilled. The drilling of this hole would have completed that portion of the work. The succeeding shift, known as the "Berg shift," completed the drilling of this hole, and loaded and discharged all the blasts except one in the east end, which failed to explode, leaving what is termed a "missed hole." By rule established by custom in the mine, it was the duty of the boss of the off-going shift to notify the on-coming shift of any missed holes or other dangers. When the Bray shift came on duty, the men were notified of the missed hole above mentioned. This shift cleared out the debris caused by the blasting done

by the previous shift. The Murphy shift came on duty again sixteen hours after they had left the bottom of the shaft as above described. The evidence in the case is contradictory as to whether or not the Murphy shift was notified of this missed hole, which had remained through the work of the two preceding shifts. The Murphy shift came on duty at 7 a. m. on the 14th of February, and found loose rock and debris yet remaining in the shaft, in which water had also accumulated. A pump used in removing this water was out of repair, and much time was taken in clearing the water from the bottom of the shaft. After the water was cleared out, Murphy and Shannon were working in the east end of the shaft and their co-laborers, Robinson and Cassidy, on the west end thereof. A short time before the expiration of the eight-hour time of their shift, and while Murphy and Shannon were clearing up the said debris, Murphy working with pick and Shannon with the shovel, Murphy in some manner discharged said missed blast, which killed both and wounded Robinson, working on the other end, some ten or twelve feet away. Upon the trial of the case before a jury a verdict was returned in favor of the plaintiffs for the sum of \$20,000. Judgment was subsequently entered thereon, and appeal taken to this court.

Motion is made to dismiss this appeal for the reasons that the notice of appeal is insufficient, and that the undertaking on appeal was filed prior to the notice of appeal, and does not describe the judgment appealed from, and does not name an obligee. The notice of appeal, omitting the formal parts, is as follows:

“You will please taken notice that the defendant in the above entitled action hereby appeals from the judgment made and entered herein against the defendant on the

24th day of July, 1900, to the supreme of the state of Washington, and from the whole and every part thereof."

Said notice was served on the attorneys for the respondents on the 24th day of August, 1900, and was filed with the clerk of the lower court on the next day. Under our liberal statutes relating to notices of appeal this notice is sufficient. *Roberts v. Shelton Southwestern R. R. Co.*, 21 Wash. 427 (58 Pac. 576); Laws 1899, p. 79, § 1.

The judgment in this case was signed by the judge of the lower court on the 16th day of July, 1900, and was filed and entered by the clerk on the 24th day of July, 1900. There was but one judgment in the case. The undertaking on appeal was filed on August 25, 1900, and describes the judgment as having been made on July 16th. Under § 6505, Bal. Code, the appeal bond may be filed with the clerk "at or before the time when the notice of appeal is given or served." The notice of appeal was given on the 24th day of August, 1900, and filed the next day. The undertaking is an appeal bond and supersedes, and undertakes "that the appellant will satisfy and perform the judgment appealed from." Both the notice of appeal and bond were sufficient. The motion will be denied.

Some days before the cause was called for trial defendant filed and argued a motion for a continuance, which motion was denied by the trial court, and this ruling is claimed by appellant as error. Defendant did not save an exception to the ruling of the court denying this motion for a continuance. We are of the opinion that the motion was properly denied, for the reason that the evidence sought to be obtained, and on account of the absence of which the motion was made, was not set out in the affidavit, no showing was made that the witness

named would be present at the trial, and no showing that the witness could be found, or that his evidence would be produced at the trial.

The next error complained of is that the court erred in permitting the case to go to the jury because the appointment of Jennie C. Shannon guardian *ad litem* was void, for the reason that both she and the minors were at said time residents of the state of Idaho. The record discloses that at the time of the commencement of the case the court, upon motion and affidavit showing the existence of the cause of action and the infancy of the plaintiffs, Earl B. and Myrtle M. Shannon, the non-residence of the plaintiff and the said minors, and that said minors had no regularly appointed guardian, made an order appointing the said Jennie C. Shannon, the mother of the infants, their guardian *ad litem* for the purpose of bringing the action. This application was made *ex parte* and without notice to the defendant. Defendant thereafter appeared and filed a motion for security for costs on account of the non-residence of the plaintiffs. The motion was granted and a cost bond filed. Defendant thereafter appeared and denied the appointment, on information and belief, and objected to the said appointment on the ground that the court was without jurisdiction to make it. Counsel do not call to our attention any case directly in point upon the question here, but cite the case of *De La Montanya v. De La Montanya*, 112 Cal. 131 (44 Pac. 354), in support thereof. While this case is not directly in point, it seems to support the opposite view from that which it was cited to support. That was a divorce case, where the father had taken his children out of the jurisdiction of the California courts. The mother had obtained a decree of divorce, and then brought an independent action for the custody of the

children, and had a third party appointed guardian *ad litem*. This guardian *ad litem* appeared in the action and admitted the allegations of the complaint. The defendant did not appear in the case. Subsequently the court entered judgment as prayed, and, among other things, awarded the custody of the children to the plaintiff, and required defendant to bring the children into the state of California and surrender them to the plaintiff. Defendant afterwards applied for an order vacating this decree because the court had no jurisdiction to make it. This application being denied, an appeal was taken and the cause reversed. The appellate court said:

“Jurisdiction to appoint a guardian for infants, under the American system, is entirely local. I do not doubt that the mere presence of infants within a jurisdiction is sufficient to confer jurisdiction, although they may be residents of another state. But as such jurisdiction is always exercised for the good of the child, the courts would never allow the power to be used for purposes of oppression, or to prevent an infant temporarily within its jurisdiction from being taken away, when its best interests required it, to its more permanent residence. The jurisdiction is never used except when necessary for the good of the child.”

The other authorities cited in support of the contention are upon the question of guardians in probate matters. Clearly, in matters of this kind, the guardian must be appointed upon petition therefor showing property in the state, and a bond must be given. Bal. Code, § 6395 *et seq.* Section 6410, Bal. Code, under the title “Guardianship of Infants,” expressly provides as follows:

“Nothing contained in this chapter shall affect or impair the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or

matter pending therein, or to commence and prosecute any suit in his behalf."

Under the title "Parties to Actions," § 4832, Bal. Code, provides:

"When an infant is a party, he shall appear by guardian, or if he has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act. Said guardian shall be appointed as follows: 1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant."

No bond is required in cases of this kind, and there is no provision in our statute requiring a guardian in cases of this kind to be a resident of the state. We cannot hold that an infant, being, with its parent, a resident of another state, having a joint cause of action existing in its behalf in this state, to which its parent is a party, cannot, by reason of the fact of its non-residence, petition the court to appoint such parent a guardian *ad litem* to maintain that action, especially when such parent is a party plaintiff and has, by bringing the action, subjected herself to the jurisdiction of the court, and is, in fact, with her wards, within the jurisdiction thereof at the trial when objection is first made, and where the infant itself is plaintiff.

The next error complained of is that the court erred in giving to the jury the following instruction:

"Now, gentlemen, I charge you that a fellow servant or fellow servants are those who are working together in a common employment to a common end, under the master or principal. Persons working together in a common general employment may be fellow servants with regard to that general employment, and yet it might be under the circumstances that one of them could be a principal or master with regard to some particular part

of that employment. As in this case, it might be—Well, I will not take this case. I will take an illustration. It might be that a shift working in a shaft would be fellow servants with regard to driving holes, blasting, mucking out; and yet it might be that the principal or master could have delegated to one of them the duty of seeing that all the blasts were discharged, and that there were no missed holes left when the succeeding shift should come on to work. So that as to that particular duty, if the principal should have assumed that duty,—should have assumed the obligation of performing that duty for them,—then the principal could, I say, have delegated that particular duty to one of those who were engaged as a fellow servant in the other duties that I have mentioned.”

The evidence in this case clearly shows that at the time the missed blast was exploded, Murphy, the pusher, and Shannon were working together,—the former using the pick and the latter a shovel,—and that the explosion occurred by reason of a stroke from the pick which Murphy was using. It does not appear that either knew of the existence of the missed blast. Clearly, therefore, if there was no delegated authority from the master to Murphy to notify his co-laborers of any hidden or unseen danger,—dangers which the servants knew, or in the exercise of reasonable diligence should have known, having better facilities for knowing than the master,—Murphy and Shannon were fellow servants, and the neglect of the one to notify the other of such dangers would preclude a recovery by the other against the common master. In the trial of the case it became a question of fact whether the pushers were vice principals or fellow servants with their co-laborers. If they were vice principals, knew of the hidden or unusual danger, when their subordinates were ignorant thereof, and neglected to inform those under them of it, their neglect was the negligence of the

master. The court simply told the jury, by this instruction, that persons working together as fellow servants might be fellow servants with regard to some parts of the employment, and yet one of them might be a principal or master with regard to some particular part of the employment. If the court had directed the jury that, if they found from the evidence that the pusher on each shift had been appointed by the defendant to look for hidden or unusual dangers not inherent in the work, and not to be anticipated in the labor in which Shannon and others were employed and to report the same to those working with him and under him, then he was a vice principal, and such pusher's negligence would be imputed to the defendant, defendant could not have questioned the correctness of this instruction; and this, in fact, is the meaning of the instruction above quoted. The instruction, standing alone, may be subject to criticism, but, taken together with the other instructions upon the same subject, it fairly states the law. Further along the court uses this language:

"Or if you find from the evidence that there was a missed blast there, and that it was the duty of the defendant to discover it and make it known to the deceased, and that it had been discovered, and that it was placed in such a condition as to be obvious to the deceased when he entered the shaft to work, and that the deceased did see it, or, by the use of reasonable diligence, could have seen it, then you must find for the defendant."

In the trial of the case it became an important question whether the pushers were vice principals or fellow servants, and this was a question upon which the court was instructing the jury, and to which the instruction applied.

Appellant urges as the fourth error excessive damages, given under the influence of passion and prejudice. There

is nothing in the record tending to show any such motive as passion or prejudice on the part of the jury, and, under the rule announced in *Walker v. McNeill*, 17 Wash. 582 (50 Pac. 518), this court will not disturb the verdict herein.

Under the fifth and sixth assignments of error, appellant urges the reversal of this case because the verdict is not supported by the evidence, and that the same is against law. The question involved in this assignment is whether or not Shannon, by reason of his employment, assumed the risk incident to missed holes. It is settled in this country, as a general rule, that the master is charged with the duty of furnishing his servant a reasonably safe place in which to work, and impliedly says to him that there is no other danger in the place than such as is obvious and necessary. *Baltimore & O. R. R. Co. v. Baugh*, 149 U. S. 368 (13 Sup. Ct. 914); *New England R. R. Co. v. Conroy*, 175 U. S. 323 (20 Sup. Ct. 85); *McDonough v. Great Northern Ry. Co.*, 15 Wash. 244 (46 Pac. 334); *Hammarberg v. St. Paul, etc., Lumber Co.*, 19 Wash. 537 (53 Pac. 727).

On the other hand, the servant, when he engages to the master to do a particular piece of work, assumes all the risks and hazards incident to or attendant upon the particular employment, including the risks and hazards resulting from the negligence of his fellow servants. *Hough v. Texas & Pacific R. R. Co.*, 100 U. S. 213; *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642 (6 Sup. Ct. 59); *Baugh Case*, *supra*.

It is said in the *Baugh Case*, *supra*:

"But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employee in respect thereto. That positive duty does not go to the extent of a guarantee of safety, but it does re-

quire that reasonable precautions be taken to secure safety, and it matters not to the employee by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee."

In the *Hammarberg Case*, *supra*, this court said:

"It is gratifying, however, to observe that recently judicial opinion seems to favor a restriction of the doctrine of non-liability for the actions of fellow servants, and the English rule, that a servant in command is a fellow servant, has been repudiated by a great majority of the American cases, and it seems now to be pretty well established that, in order to constitute one a fellow servant, he must be in the same common employment with the one who has suffered from his negligence. *Shearman & Redfield, Negligence* (4th ed.), § 234. And the question of whether particular employees are fellow servants is in some states submitted to the jury. *Mullan v. Philadelphia & S. M. S. Co.*, 78 Pa. St. 25 (21 Am. Rep. 2). The rule was announced in that case that the risk which the laborer assumes from the neglect of his fellow is where they are co-operating in the same business, so that he knows that the employment is one of the incidents of their common service. It has been held in Georgia that none are deemed to be in a common employment who have no opportunity to use precautions against each other's negligence. *Cooper v. Mullins*, 30 Ga. 146 (76 Am. Dec. 638). And this, we think, is in strict consonance with the just theory upon which the rule was first recognized."

And, at p. 452, quotes approvingly from *Sadowski v. Michigan Car Co.*, 84 Mich. 100 (47 N. W. 598) as follows:

"The rule adopted by the federal courts, and in most of the states, and which seems to us most in consonance

with reason and humanity, is that those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools for labor, are engaged in a different employment from those who are to use the place or appliance when provided, and they are not therefore, as to each other, fellow servants. In such case, the one whose duty it is to provide and look after the safety of the place where the work is to be done represents the master in such a sense that the latter is liable for his negligence."

Applying these rules to the case before us, the question naturally arises, was the unexploded blast a danger necessarily incident to the employment? And, if not, was the pusher of another shift, having notice of the danger, a fellow servant with deceased in respect thereto? If the twelve men who were engaged in sinking the shaft had been working together, each doing his part, and each having notice of the work of the other and the existence of the unexploded blast and the danger thereof, and one of them carelessly discharged the same, clearly no liability therefrom could be imputed to the master. But where the men were divided into shifts working at different times, each shift taking its turn, then, under the rule above named, where there were hidden, unusual dangers arising from some cause unknown to an on-coming shift, it became the positive duty of the master to notify the servant in some way of the extra hazard which he was about to encounter. And this, it seems, the master had provided for, by delegating to the pusher of each outgoing shift the additional duty of notifying an on-coming shift of the missed holes. This being a positive duty of the master, the neglect of the pusher of the out-going shift to notify the on-coming shift was the negligence of the master and not of the fellow servant. Whether Shannon actually knew of the missed hole, whether the same

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was obvious, and whether with reasonable diligence he could have ascertained that there was a missed hole, were questions which were submitted properly to the jury, and were by the general verdict answered in the negative. There was evidence in the case which required the court to submit the questions to the jury and which supports the verdict.

No error appearing in the record, the case must be affirmed.

REAVIS, C. J., and FULLERTON and DUNBAR, JJ., concur.

[No. 3572. Decided February 28, 1901.]

CHEHALIS BOOM COMPANY, *Appellant*, v. CHEHALIS COUNTY *et al.*, *Respondents*.

24	186
124	877

CORPORATIONS — FRANCHISE — WHAT CONSTITUTES.

The right given by statute to form boom companies for the purpose of improving floatable streams, operating booms therein, and charging tolls for logs boomed, constitutes a franchise to any company organized and operated thereunder, although the right possessed by such company may not be an exclusive one.

TAXATION — CORPORATIONS — RIGHT TO TAX FRANCHISE — NOT AFFECTED BY LICENSE FEES.

The annual license fee of ten dollars imposed by statute upon corporations doing business in this state, is merely an excise upon the right of the corporation to exist and does not supersede the right to tax the franchise of the corporation.

SAME — ASSESSMENT — OBJECTIONS TO VALUATION — TIME AND PLACE TO URGE.

A corporation cannot complain of the arbitrary valuation placed upon its franchise by the assessor, where it has made no application to the board of equalization for a reduction of the valuation placed upon its personal property.

Appeal from Superior Court, Chehalis County.—Hon. CHARLES W. HODGDON, Judge. Affirmed.

Sidney Moor Heath, for appellant.

W. H. Abel, for respondents.

The opinion of the court was delivered by

REAVIS, C. J.—Suit to enjoin the collection of a tax upon the franchise of a boom company. The appellant is a domestic corporation, organized in 1888 under the provisions of the statute relating to boom companies, found in § 1590 and following sections, 1 Hill's Code. The principal office and place of business of the appellant is in Chehalis county. In the year 1898 an officer of the company returned a detail list to the county assessor of certain real estate and personal property, consisting of fixtures, etc. Upon the detail list the assessor fixed the value of the real property, and thereupon entered the value of the personal property, and added the franchise of the company, fixing the value of the personal property, including the franchise, at \$20,000.

The errors deemed material for consideration here, as presented by the appellant, are two: (1) That there was no franchise to tax, or, if the company has a franchise, that it is not such a one as is subject to taxation; and (2) that the assessment was arbitrarily, fraudulently, and maliciously made. The first contention, that the franchise of a boom company is not subject to taxation, may be considered. The objects of the corporation, as stated in its articles, are to build, maintain, and operate booms on the Chehalis and other rivers, and obtain franchises for the same; to assort, drive, store, and deliver to owners or mills such logs as shall come into such booms; to own or condemn land for the purposes mentioned; to dig canals, build railroads, own and operate steamers, and transact any and all business pertaining to the booming and handling of logs. The statute under which the in-

corporation was made prescribes the privileges and liabilities of boom companies. They are authorized, generally, to improve floatable streams, and meandered rivers and sloughs and navigable waters are declared to be public highways, and such corporations are declared to be public corporations. The improvement of the streams and sloughs and waters is deemed a public use. Such companies are authorized to charge tolls for all logs boomed by them, and they are given the right of eminent domain. It appears from the record that appellant has for many years had established a boom in the Chehalis river and been engaged, pursuant to the purposes of its incorporation, in carrying on its business. The right of appellant to establish and maintain its boom upon the stream which is declared a public highway, and to collect tolls for logs and timber, is a privilege and franchise. An examination of the provisions of the statute under which it is incorporated clearly indicates that such rights are conferred by public authority. The contention of counsel for appellant is that the privileges received by appellant under the statute are open and common to every person or corporation, and not exclusively in appellant, and therefore not the subject of taxation, and the constitutional provision against the granting of exclusive privileges is invoked. But this question was determined adversely to this argument in *Commercial Electric Light & Power Co. v. Judson*, 21 Wash. 49 (56 Pac. 829), which was followed in *Edison Electric Illuminating Co. v. Spokane County*, 22 Wash. 168 (60 Pac. 132). In neither of these cases was the right possessed by the company an exclusive one, in the sense that another company or person might not, under the same authority, engage in the same business, or enjoy the same privileges. The real question is, are such privileges valuable, and do they

exist by warrant of public authority? The right to occupy such streams and to charge tolls for booming logs and timber seems to follow, without any uncertainty, the recognized designation of a franchise. *Sellers v. Union Lumbering Co.*, 39 Wis. 527; 4 Am. & Eng. Enc. Law (2d ed.), p. 707, art. "Boom Companies."

It was observed in *Ridpath v. Spokane County*, 23 Wash. 436 (63 Pac. 261):

"There can be no question but that the property of a domestic corporation of every nature in this state, such as this, is assessable to the corporation. This includes both tangible and intangible property. The tangible property may be valued in connection with its use with the intangible."

But counsel for appellant urges that the license of \$10 imposed by the legislature annually upon corporations doing business in the state is in lieu of other franchise taxation. It may be said with regard to this license fee, whatever it may be, that it goes no further than an excise upon the right of the corporation to be; that it is entirely distinct from the right to do. The privileges enjoyed by appellant in the operation of its boom seem to fall directly within the rule announced in *Commercial Electric Light & Power Co. v. Judson*, *supra*, and the other cases mentioned determined by this court.

The assessment seems to have been upon the value of the use of the franchise in connection with the tangible property of appellant. It appears that appellant made no application to the board of equalization for the reduction of the valuation placed upon its personal property. It would seem that, under the ruling of this court in *Olympia Water Works v. Thurston County*, 14 Wash. 268 (44 Pac. 267), *Olympia Water Works v. Gelbach*, 16 Wash. 482 (48 Pac. 251), and *Edison Electric Il-*

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luminating Co. v. Spokane County, supra, specially applied to franchises, appellant cannot now well complain of the arbitrary valuation placed upon its personal property by the assessor. However, an examination of the testimony at the trial does not incline us to disturb the finding of the superior court upon this issue.

Judgment affirmed.

DUNBAR, FULLERTON and ANDERS, JJ., concur.

[No. 3814. Decided February 28, 1901.]

MAGDALENE F. GOORE, *Respondent*, v. ESTEN GOORE, *Appellant*.

24 139
142 520

DIVORCE — SERVICE BY PUBLICATION — AFFIDAVIT — SUFFICIENCY.

Under Bal. Code, § 4877, authorizing summons by publication in actions for divorce, when defendant cannot be found in the state, upon the filing of an affidavit by plaintiff or his attorney, stating he believes defendant is not a resident of the state, and alleging the existence of one of the cases specified in the statute in which publication is permissible, the affidavit in support of service by publication is sufficient, although it states conclusions instead of probative facts, and although it makes no reference to the property of the parties, since the disposition of the property is a mere incident of the divorce and follows from the action itself.

PLEADING — AMBIGUITY — CONSTRUCTION.

Where the language of an affidavit is capable of two constructions, that which is plainly consonant with common sense and the actual facts must be adopted.

SAME — SUMMONS — DESCRIPTION OF PROPERTY INVOLVED.

Where a summons by publication in an action for divorce notifies defendant that one of the objects of the action is to procure "the equitable distribution to plaintiff of the property, real and personal, of plaintiff and yourself," it is sufficient to notify the defendant that the disposition of his separate property, as well as that of the community, is contemplated, since the court has jurisdiction in divorce to dispose of all the property of the parties described in the complaint.

Appeal from Superior Court, Walla Walla County.—
Hon. THOMAS H. BRENTS, Judge. Affirmed.

B. L. & J. L. Sharpstein, for appellant.

Wellington Clark, for respondent.

The opinion of the court was delivered by

MOUNT, J.—This action was brought as a divorce case, and the decree entered after proof, by default, upon service by publication. After decree, defendant appeared specially and moved to set aside parts of the decree for want of jurisdiction. This appeal raises the question as to the sufficiency of the publication proceedings to give the court jurisdiction to enter the decree, and particularly that part of it which disposes of the real property described therein. The affidavit for publication, omitting the formal parts, is as follows:

“Wellington Clark, being sworn, on oath deposes and says: That he is the attorney for the plaintiff in the above entitled action, and as such attorney therein makes this affidavit for and on behalf of the plaintiff in said action; that he believes that the defendant in said action is not a resident of the state of Washington, and cannot be found therein, but that his place of residence is unknown to said plaintiff and this affiant, and that said action was brought by plaintiff against said defendant for the purpose of securing the dissolution of the bonds of matrimony existing between said plaintiff and defendant under subdivisions 4 and 5 of the last clause of subdivision 6 of section 5716 of the 2d vol. of Ballinger’s Code and Statutes of said state, and that good grounds for said action of divorce exist in favor of said plaintiff and against said defendant.”

Upon the filing of this affidavit, and return of the sheriff of Walla Walla county to the effect that defendant could not be found, summons was published, omitting the formal parts, as follows:

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"The State of Washington to the said defendant, Esten Goore: You are hereby summoned to appear within sixty days after the date of the first publication of this summons, to-wit, within sixty days after the 21st day of December, A. D. 1899, and defend the above-entitled action in the above-entitled court, answer the complaint of the plaintiff therein and serve a copy of your answer upon the undersigned attorney for plaintiff at his office below stated; and, in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint which has been filed with the clerk of said court. The object of said action is to obtain a judgment and decree of said court in favor of said plaintiff against you, forever dissolving the bonds of matrimony existing between said plaintiff and you, and forever divorcing said plaintiff from you, upon the ground of abandonment of the plaintiff by you for one year previous to the 15th day of December, A. D. 1899, of the cruel treatment of plaintiff by you, and for your neglect and refusal to make suitable provision for your family, for the awarding of the custody of Catherine A. Goore and Charles A. Goore, minor children of plaintiff and yourself, to plaintiff during their minority; and of the equitable distribution to plaintiff of the property, real and personal, of plaintiff and yourself. Wellington Clark, Attorney for plaintiff. P. O. address, Walla Walla, Walla Walla county, Washington. Date of last publication February 1, 1900."

The lands involved herein were filed on by defendant under the homestead law of the United States, March 18, 1892. He lived on the land continuously until October 9, 1897. The parties were married on October 23, 1896, and had two children. The decree of divorce was entered March 24, 1900, awarding all the property and both children to plaintiff. The motion to vacate the decree was filed and overruled June 21, 1900. Defendant was not a resident of the state after October, 1898. It is argued here that the court had no jurisdiction to make the decree

herein, for the reasons (1) that the affidavit for publication would not authorize a publication of summons where the decree sought affected any property of defendant; (2) because property was not mentioned therein, and because the affidavit specifies that *the bonds of matrimony exist* under certain sections of the statute, and not that the action is for divorce under those sections; and (3) for the reason that the summons, as published, would notify the defendant only that the property of the plaintiff and himself was to be affected, and not his separate property. Section 4877, Bal. Code, is as follows:

“When the defendant cannot be found within the state (of which the return of the sheriff of the county in which the action is brought, that the defendant cannot be found in the county, is *prima facie* evidence), and upon the filing of an affidavit of the plaintiff, his agent or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of the state, . . . and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons, by the plaintiff or his attorney in either of the following cases: . . . 4. When the action is for divorce in the cases prescribed by law; . . .”

It will be readily observed that there is no requirement that the affidavit showing non-residence when the action is for divorce shall mention the property, and such statement was not necessary in order to authorize publication of summons. The disposition of the property and the children is a mere incident to the divorce and follows from the action itself, which is admitted in the argument. *Adams v. Abbott*, 21 Wash. 29 (56 Pac. 93); *Carney v. Simpson*, 15 Wash. 227 (46 Pac. 233); *Philbrick v. Andrews*, 8 Wash. 7 (35 Pac. 358); *Webster v. Webster*, 2 Wash. 417 (26 Pac. 864).

It is no more necessary to mention the property in the

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affidavit than it is to mention the children. It is enough to say that the defendant cannot be found within the state, and that the action is for divorce in one of the cases prescribed by law, naming the case. Several authorities are cited by appellant to the effect that the affidavit is not sufficient to authorize service by publication of summons, so as to give the court jurisdiction to make any decree, because the conclusions are stated in the affidavit, and not the probative facts. These authorities are all under statutes requiring an order of the court for publication, and it is there held, as in *Forbes v. Hyde*, 31 Cal. 342, that "the ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probatory facts upon which each ultimate fact depends. . . . The ultimate facts stated in the statute are to be found, so to speak, by the court, or judge, from the probatory facts stated in the affidavit, before the order for publication can be legally entered." Under the statute of Washington, *supra*, no such order is required. The summons is not even issued by the clerk and no judicial determination is required before publication. When the ultimate fact is *stated* substantially in the language of the statute, publication may be made. This court held in *DeCorvet v. Dolan*, 7 Wash. 365 (35 Pac. 72, 1072), at p. 367, as follows:

"But the statement that the defendants reside out of the territory is the statement of a fact, and is all that need be said upon the subject. The statute does not make it necessary to show where the defendants resided. This is immaterial, so that they were non-residents. . . . The statute clearly makes the fact that the defendant resides out of the territory ground for obtaining service by publication, and upon an affidavit made to that effect the summons is issued by the clerk as a matter of course, it not being necessary to obtain any order from the court

or judge for that purpose, as is the case in most of the states before service by publication is authorized. Statutes authorizing service upon non-residents by publication are constitutional, and the jurisdiction is dependent upon a compliance with the statute providing for the publication. *Brown on Jurisdiction*, § 51. We are of the opinion that, in this instance, the affidavit was sufficient to warrant the service had."

In *Ervin v. Milne*, 17 Mont. 494 (43 Pac. 706),—a Montana case,—the court, in distinguishing the cases previously passed upon under the statute which required an order of the court for publication from the statute then under consideration, say:

"We are satisfied that the act of the clerk under the law of 1887, in causing the summons to be published, being a ministerial act—it is necessary only to present the application by affidavit to him as a ministerial officer; and that a judicial question should not be submitted; and that the clerk should not be required to determine from the probative facts whether the ultimate facts exist; and that, as a consequence, the probative facts need not be set forth in the affidavit presented to the clerk, but that the ultimate facts are sufficient; and that the affidavit submitted to the clerk is sufficient, if it sets forth, substantially in the language of the statute, enough of the ultimate facts recited in the statute as reasons for the publication of the summons."

In *Calvert v. Calvert*, 15 Colo. 390 (24 Pac. 1043), the court say, at page 397:

"The complaint was on file, and the affidavit of non-residence followed. The assertion of a cause of action therein, coupled with the subsequent action of the court in obtaining the jurisdiction by publication, should, in our judgment, be sufficient for our saying that to use the language of the statute in the affidavit, so worded as ours is, is a complete and full compliance therewith. . . . To say in this case that more is required by the statute

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than is sufficient to inform the clerk that the defendant is a non-resident, that the plaintiff has a cause of action, and that the defendant is a necessary party to the action, is, in our judgment, extending the operation of the code beyond its legitimate purpose, and works out a conclusion utterly at variance with its spirit and letter. In this case the complaint is filed, the summons is issued, the affidavit of non-residence and that a cause of action exists, and that the defendant is a necessary party follows. This seems to be a full satisfaction of the directory provisions of the statute. We are inclined to think that the code of Kansas and Nebraska is more analogous to that of Colorado than California, and that the view above expressed is supported in the cases of *Bogle v. Gordon*, 39 Kan. 32, and *Fulton v. Levy*, 21 Neb. 478."

In *Fulton v. Levy*, 21 Neb. 478 (32 N. W. 307), the court say:

"It will be seen that this view of the question conforms to the requirements of § 78. It states the nature of the cause of action, not in apt words, perhaps, but sufficiently so that the case appears to be one in which service by publication was authorized, and that service by summons could not be made in this state on the defendant or defendants to be served by publication."

The rule stated in *Atkins v. Atkins*, 9 Neb. 200 (2 N. W. 466), that, if there is a total want of evidence upon a vital point in an affidavit, the court acquires no jurisdiction by publication of the summons, but where there is not an entire omission to state some material fact, but it is insufficiently set forth, the proceedings are simply voidable, is the true rule. The proceeding to obtain service by publication should be liberally construed, in order that justice may be done. In *Atkins v. Atkins*, *supra*, there was a total failure to state a material fact in the affidavit,—the nature of the cause of action. Hence the affidavit was held insufficient. Where, however, the statement is

merely defective, but the essential facts are stated in the affidavit, although somewhat indefinitely, the affidavit will not be void. We hold, therefore, that the affidavit in this case was sufficient, and the judgment of the court below must be affirmed. See, also, *Gillespie v. Thomas*, 23 Kan. 138; *Easton v. Childs*, 67 Minn. 242 (69 N. W. 903).

It will be seen that there is a clear distinction between the statutes requiring a judicial determination and those where the publication is a mere ministerial act. While it would have been better practice to have named the "cause prescribed by law," such as abandonment for one year, cruel treatment, etc., yet there is not a total want of statement of the cause in the affidavit; and we are not disposed to disturb the decree because the practice might have been more perfect.

It is argued that the affidavit is not sufficient, because it states that "the bonds of matrimony exist" under certain sections of the Code. It is true that the wording of the affidavit is susceptible of such a construction but no one would place such a construction upon it unless particular attention were called to it. The meaning of the affidavit is plain,—that the action is brought for divorce under the subdivisions named,—and is sufficient to uphold the publication of summons so as to give the court jurisdiction.

It is also urged that the summons published would only notify defendant that the community property of plaintiff and defendant would be affected, and not his separate property. This also is placing a narrow and technical construction upon the language used in the summons. The language of the summons is, "the equitable distribution to plaintiff of the property, real and personal, of plaintiff and yourself." This language certainly would notify defendant that plaintiff was asking for a distribution of property. It was not necessary for the particular property

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to be described in the summons. *Philbrick v. Andrews, supra*; *Webster v. Webster, supra*. The court had jurisdiction to dispose of the property described in the complaint, whether it was the separate or community property, or otherwise.

Finding no error in the record, the cause will be affirmed.

REAVIS, C. J., and DUNBAR, FULLERTON and ANDERS, JJ., concur.

[No. 3701. Decided March 1, 1901.]

MINNIE MERCIER, *Respondent*, v. TRAVELERS INSURANCE
COMPANY OF HARTFORD, CONNECTICUT, *Appellant*.

PLEADING AND PROOF — VARIANCE — MATERIALITY.

Where the complaint in an action upon an accident policy to recover for the death of the insured alleged that he fell and bruised his left side, directly over the heart, and died as a direct result of such injury, and a bill of particulars filed in connection with such complaint alleged that the death of the insured was caused by the injuries to his side, and the character of the injuries causing his death were described as being a bruise and injury upon the side directly over the heart, causing a malignant growth of spleen and fatty degeneration of the heart, the ultimate fact alleged is that the death was caused by the injury to his side, and the pleader's conclusion that the injury produced malignant growth of spleen and fatty degeneration of the heart, while the evidence showed that the injury produced inflammation of the pericardium instead, would constitute but an immaterial variance, which could not have misled the defendant to its prejudice.

VERDICT — INCONSISTENCY BETWEEN GENERAL AND SPECIAL.

Where a complaint, in addition to containing sufficient facts to state a cause of action, includes in its allegations immaterial statements, which amount to nothing more than the pleader's conclusion from the facts stated, a special verdict finding against him on such immaterial allegations cannot be held as inconsistent with a general verdict in his favor.

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge. Affirmed.

Graves & Graves, for appellant.

John H. Roche, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This was an action brought by the respondent, the wife of one Arthur Mercier, on an accident insurance policy. The part of the complaint material for the purposes of this opinion is as follows:

“That the said Arthur Mercier accidentally fell and injured his left hand, between the fingers thereof, and injured and bruised his left side, directly over the heart, from which injuries he never recovered, and died on the 29th day of January, 1899, from the direct result of said injuries, independent of all other causes, and that the receiving of said injuries was wholly and entirely accidental on the part of the said Arthur Mercier, deceased.”

The material part of the answer was as follows:

“That the death of said Arthur Mercier was not occasioned by accident or accidental means, or by any other means within the terms of the contract of insurance set forth in said amended complaint, and in this answer as ‘Exhibit B,’ but that his death was occasioned solely and entirely by disease, and such diseased condition of his body was not occasioned by any accident received by him within the terms of said contract of insurance.”

Before the trial, the defendant demanded of plaintiff a bill of particulars in answer to the following questions:

“1. State fully and definitely in what manner and through what agencies the said Arthur Mercier referred to in the complaint fell and received the injuries referred to in paragraph four of said complaint.

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2. State fully and definitely whether the death of the said Arthur Mercier was occasioned by the injury to his hand or by the injury to his side; both of which injuries are referred to in paragraph four of said complaint.

3. State fully and definitely what the character of injuries were to the hand of the said Arthur Mercier, which are referred to in paragraph four of said complaint.

4. State fully and definitely what the character of the injuries were to the side of said Arthur Mercier, and how they caused his death, which are referred to in paragraph four of said complaint."

Plaintiff answered the bill as follows:

"Answer to Interrogatory No. 1: The said Arthur Mercier accidentally stumbled and fell, and said fall was not caused by any other means or agencies known to plaintiff.

Ans. to Int. No. 2: The death of the said Arthur Mercier was caused by the injuries to his side, the injury to his hand slightly, if any, contributing thereto.

Ans. to Int. No. 3: A deep cut between the third and fourth fingers of the left hand.

Ans. to Int. No. 4: Bruised and injured upon the side directly over the heart, causing a malignant growth of spleen and fatty degeneration of the heart."

The following special interrogatories were propounded to the jury and answered as follows:

"1. Did Arthur Mercier die from the diseased condition of the heart? Answer: Yes.

2. Did the diseased condition of his liver contribute to causing his death? Ans. No.

3. Was the diseased condition of his liver caused by any accidental injury received by him? Ans. No.

4. Was Arthur Mercier at the time of his death afflicted with malignant growth of the spleen or fatty degeneration of the heart? Ans. No."

There was a general verdict for the plaintiff. Dr. Byrne, who was the physician attending upon the deceased at the time of his death and who made a post-mortem examination, testified that there was no malignant growth of the spleen or fatty degeneration of the heart; upon which the defendant made a motion to strike the testimony of the witness, for the reason that it did not correspond with the allegations of the complaint. The motion was overruled. Upon the conclusion of the trial, the objection was raised by the appellant that the special findings of the jury were at variance with the general verdict and at variance with the allegations of the complaint. This contention was not sustained by the court. Judgment was rendered, and an appeal is brought here, alleging the action of the court in that respect as error.

It is insisted by the appellant that, when the general verdict and special findings conflict, the special findings must control; that the bill of particulars was descriptive and must be proven as alleged; that by reason of the allegation in the bill of particulars that the deceased was at the time of his death afflicted with malignant growth of the spleen or fatty degeneration of the heart, the defense was misled as to the character of defense which it should interpose, or of the charges which it should meet; that, under the rule laid down in Greenleaf on Evidence (14th ed.), § 58, the allegations in the bill of particulars here are of essential description and must be proved with strictness. Many cases are cited in support of appellant's contention in this regard, the first of which is *Wabash Western Ry. Co. v. Friedman*, 146 Ill. 583 (30 N. E. 353), where, in an action for personal injuries, the declaration alleges that the plaintiff was a passenger on defendant's train between certain sta-

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tions, and the proof showed that the plaintiff was a passenger between two other stations, the termini alleged being the intermediate stations, between which the accident happened. The variance between the declaration and the proof was held fatal to recovery. In that case it was averred that on a certain date the plaintiff became and was a passenger on a certain train of the defendant, and was on the said railroad to be carried, and was accordingly being carried, on the said train from Kirksville to Glenwood Junction; and the further fact was set forth that between Kirksville and Glenwood Junction, through the negligence of the defendant, the accident happened which resulted in plaintiff's injury. The proof showed that the plaintiff took the car and became a passenger on such at Moberly, some distance south of Kirksville, and that his destination was Ottumwa, several miles north of Glenwood Junction, so that it was between Moberly and Ottumwa that the accident happened.

This case might possibly be distinguished from the case at bar from the fact that the court held that the contract set out in the declaration had not been proven. The contract alleged was carriage from Kirksville to Glenwood Junction, when the actual contract, as shown by the proof, was from Moberly to Ottumwa. Still, the whole case shows conclusively, from the record, that the defense in that case was in no way misled by the variance between the proof and the allegation, and we think the court laid down a rule which is not in consonance with law or reason. Glenwood Junction and Kirksville were both on the line between Ottumwa and Moberly, and, as the greater includes the less, an allegation that the accident happened between Glenwood Junction and Kirksville was notice to the railroad that the accident happened between Moberly and Ottumwa. We are not

inclined to follow the decision in this case. The decision was intended to have been based upon well-known principles, viz., that a departure from the substance of an issue, which is made by the complaint and the evidence adduced, is fatal and constitutes a variance, and that matters of material description must be proven as alleged. But these rules are announced, and the principles which they enunciate are applied, in the interest of justice, and not for the purpose of defeating the ends of justice, as we think their application in the case quoted did.

In *Day v. Webb*, 28 Conn. 140, the question related entirely to the sufficiency of the verdict, each party claiming that the court could, with suitable changes, work the findings of the jury into form so that a judgment might be rendered in his favor. It was there announced that, if the jury returned a verdict varying materially from the issue, either omitting to find all the facts embraced in it, or, disregarding the issue, find other and different facts not in the issue, the verdict would be insufficient and the judgment would be arrested. We do not think there is anything in this case that militates against the judgment in the case at bar.

Ebsery v. Chicago City Ry. Co., 164 Ill. 518 (45 N. E. 1017), is a case for personal injuries, where the plaintiff alleged that he was knocked off of defendant's car and that, when said car was stopped and was not moving, the defendants negligently caused the grip car and trailers to be suddenly and violently started and moved onwards, running over the plaintiff and injuring him as alleged. The jury found in a special verdict that, at the time the plaintiff fell, the car was not stopped, but was in motion, and the court held that there was a variance between the allegations and the special verdict

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of the jury, and the special finding of the jury in that case was so contradictory to the general verdict that it could not be sustained. The court very properly says:

"By their general verdict the jury found that the defendant was guilty of suddenly starting into motion a car which was stationary. But the special finding is that, when the plaintiff fell, the grip car was in motion. The finding that the car was in motion when plaintiff fell is inconsistent with the verdict that defendant was guilty of starting a car which was stationary."

It can readily be seen that in that case the verdicts were inconsistent, because the alleged negligence was the action of the company in suddenly and violently starting the car while the plaintiff was on the road.

And so, without specially reviewing them, are all the other cases cited by the appellant. But it is well established that all reasonable presumptions will be entertained in favor of the general verdict, while nothing will be presumed in aid of the special findings of fact, and that the verdict will be maintained, unless the special findings are so absolutely inconsistent with it that they cannot both stand together. It is also well established that, if findings are susceptible of a double construction, that construction will be adopted which supports the general verdict. The author of *Enc. Pl. & Pr.* (vol. 3, at p. 541), after reviewing this subject and citing many cases, says:

"The numerous cases on this subject all tend to establish the doctrine that where the bill of particulars has not misled the opposite party he cannot take advantage of it to exclude the offered proof."

"Where findings are susceptible of two interpretations, the court will, if possible, adopt the one which will harmonize with and sustain the general verdict." *MacElree v. Wolfersberger*, 59 Kan. 105 (52 Pac. 69).

Where the general verdict of a jury and their special findings of fact can be harmonized and made to agree by taking into consideration the entire record of the cause, and construing the same liberally for that purpose, it is the duty of the court to so harmonize them. *Bevens v. Smith*, 42 Kan. 250 (21 Pac. 1064).

In the case at bar the appellant contends that, inasmuch as the bill of particulars alleges that the hurt which the respondent received by the accident developed, before he died, into a malignant growth of the spleen and fatty degeneration of the heart, it was misled as to the proper grounds of defense. It is said that, under such allegation, it would have no fear in going to trial, because the complaint itself exculpated the defendant, for the reason that it is a well-known fact that fatty degeneration could not result from a bruise to the side, and a scientific disquisition on that subject is indulged in. There not having been any evidence on that subject, the court does not feel competent to decide that question; but, if it be true that the complaint upon its face informed the defendant that under its terms he could not be made responsible for the death of the deceased, then it would have been proper practice to have demurred to the complaint. The original complaint in question alleges sufficient to justify the general or special verdict, and the special allegation in answer to the second interrogatory is just as definite. The allegation is that "the death of the said Arthur Mercier was caused by the injury to his left side, the injury to his hand slightly, if any, contributing thereto." This is the material allegation. The further answer to interrogatory 4, to the effect that the bruising and injuring upon the left side caused a malignant growth of the spleen and fatty degeneration of the heart, was simply a conclusion on the

part of the plaintiff in undertaking to trace the processes which finally culminated in the death. But the allegation that the death was caused by the injuries inflicted is in no way destroyed, or even contradicted, by the particularizing indulged in in answer to interrogatory 4, for the particular manner in which the injuries affected the system is a matter of pure conjecture, certainly with the jury, and very largely upon the part of medical experts. So that this allegation, if a variance at all, is absolutely immaterial, and does not touch the main issue of the case. This is shown by the answer, the principal contention therein, so far as relates to the question under discussion, being that the deceased did not die from the consequences of the accident at all, whether the accident produced fatty degeneration or any other disease or manifestation, but that he died from diseases disconnected with the accident, superinduced by a dissipated life. It is said by the appellant that the jury have found, by their general verdict, that the insured died from one disease, and, by their special findings, that he died from an entirely different one, and that as these two findings are inconsistent, under the authorities the judgment should be reversed. But this is not true in fact, for the jury found in each instance that the cause of his death was the injury to his side produced by the accident, and this was the material fact to be determined in the case. It is provided by our own statutes (Bal. Code, § 4949) that:

“No variance between the allegation in the pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and

thereupon the court may order the pleading to be amended upon such terms as shall be just."

A reading of the whole record in this case is conclusive to our minds that the alleged variance here has not misled the defendant, in any particular, to its prejudice in maintaining its action or defense upon the merits. But, even if we should have doubts upon that question, it is a matter which seems to have been relegated by the statute very largely to the discretion of the court, and it seems from the action of the court in this case that it was not proved to its satisfaction that the defendant had been misled so that any amendments to the pleadings were necessary; and, as we have before indicated, the record does not show that the court abused its discretion in this respect.

In *Missouri Pacific Ry. Co. v. Holley*, 30 Kan. 465 (1 Pac. 130, 554), where a brakeman had brought an action against a railroad company for damages incurred in coupling a car, and contributory negligence was one of the issues in the case, in answer to a special finding (No. 74), which was, "Did he know at said time that a brakeman was not expected or required, under any circumstances, to go in between two cars having Miller couplings as they were coming together for the purpose of being coupled?" the jury answered, "Yes." It would seem that this finding would be inconsistent with the general verdict in favor of the plaintiff, where the issue was contributory negligence. There the court, through Justice BREWER, in speaking of the inconsistency of some of these special findings, said:

"And yet such explanation is not satisfactory as to some of the answers, as for instance that to question No. 74 [the question to which we have just referred]. Now, under these circumstances, what is the duty of this court?"

The trial court has sustained the general verdict, thereby affirming that the answers are not in its judgment inconsistent therewith. It heard the testimony, . . . and understood better than we can the import of the questions and answers. From the whole scope of the trial, it knew, as we cannot, how the jury understood the questions, and the full intent and meaning of their answers. It will be borne in mind that the answers are not directly contradictory; that is, there is no direct affirmation in one answer, with as direct a negation in another. They are inconsistent and contradictory, only in the sense that their tendency and import seem to be in opposite directions. We all know how the same language often conveys different meanings to different minds, and how the intended meaning is determined by the peculiar facts upon which the language is based or to which it refers. With these general observations, we remark that we ought to sustain the verdict if it can be fairly done, and ought not to strain a point to harmonize the various answers for the sake of making them as a whole inconsistent with the verdict."

To the same effect are *Partonier v. Pretz*, 24 Kan. 238; *Redelsheimer v. Miller*, 107 Ind. 485 (8 N. E. 447).

In *Indianapolis & V. R. R. Co. v. Lewis*, 119 Ind. 218 (21 N. E. 660), it was said:

"On a motion for a judgment on the answers to interrogatories, notwithstanding the general verdict, every reasonable presumption will be indulged in favor of the general verdict, and if, by any reasonable hypothesis, the answers can be reconciled with the general verdict, the latter must stand. They override the general verdict only when both cannot stand together, the antagonism being such, upon the face of the record, as is beyond the possibility of being removed by any evidence legitimately admissible under the issues in the cause."

In *Omaha Life Ass'n v. Kettenbach*, 55 Neb. 330 (75 N. W. 827), it was decided that, to entitle a party

to a judgment on the special findings of a jury, where the general verdict was against him, such findings must establish all the ultimate facts, to which his right to a judgment results, as a necessary legal conclusion. It cannot be said in this case that the special findings of the jury, taking into consideration the fact that they found that the death of Mercier was caused by the injury to his side, caused by the accident which befell him, notwithstanding the fact that they found that he did not have fatty degeneration of the heart, establishes the ultimate fact that the accident was not the cause of Mercier's death. For it was that fact which was the material question under investigation in the case. Nor can it be said that the antagonism between the special and general verdicts in this case is so great that it renders impossible the admission of legitimate evidence as to the cause of the deceased's death, under the issues in the case. It was decided by this court in *Allend v. Spokane Falls & Northern Ry. Co.*, 21 Wash. 324 (58 Pac. 244), that in an action by an employee for injuries received by an explosion of giant powder on a construction train, caused by sparks from the engine, the fact that plaintiff alleges in his complaint that, "if defendant had exercised ordinary care in and about the construction and use of said engine, said sparks would not have been emitted and the explosion would not have occurred," did not limit the plaintiff to proof of defective construction and careless management of the engine, as the proximate cause of the explosion, as such allegation is merely the pleader's conclusion, drawn from the facts stated, and hence an immaterial statement, there being other sufficient allegations in the complaint charging negligence in placing the powder on the train, exposed to flying sparks, and failing to warn plaintiff

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thereof. The case at bar seems to us to fall squarely under the law announced in this case.

The judgment is affirmed.

REAVIS, C. J., and ANDERS and FULLERTON, JJ., concur.

[No. 3477. Decided March 2, 1901.]

JOHN W. TROY, as *Receiver of Angeles Manufacturing & Developing Company, Respondent*, v. H. K. BICKFORD *et al.*, *Appellants*.

FRAUDULENT CONVEYANCES — ACTION TO CANCEL — SUFFICIENCY OF EVIDENCE.

In an action to set aside a fraudulent conveyance, a finding of fraud is not supported by the evidence, when it appears therefrom that the grantor, about a year prior to the institution of a suit against him to enforce a stock subscription, left the state, leaving no property therein subject to execution, other than the lands in controversy, which he at that time conveyed to another in trust for a third person, but had continued for some time after the transfer to receive rents from a tenant on the premises, when the *cestui que trust* testified that he paid a valid consideration for the land, specifying the manner of payment, which was corroborated both by the grantor and the trustee, and there were no facts or circumstances in evidence impeaching the veracity of the witnesses who denied the fraud.

Appeal from Superior Court, Clallam County—Hon. E. D. BENSON, Judge. Reversed.

Trumbull & Trumbull, for appellants.

Benton Embree, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—The Angeles Manufacturing & Development Company is a domestic corporation. Appellant

Bickford was one of the principal subscribers to the capital stock in the corporation. The subscription was not paid, but the stock, some time thereafter, was transferred to another person, not a party to this record. Some time thereafter the corporation was declared insolvent, and such proceedings were had as resulted in the appointment of a receiver to wind up its affairs. There being no substantial assets except the unpaid subscriptions on the capital stock, the court directed suits to be instituted against such subscribers, and, among others, the appellant Bickford. Bickford was, at the time of the order directing the institution of suit against stockholders, a non-resident of the state. He had been the owner of real property of some substantial value in Clallam county, but, about a year before the institution of the suit upon his stock subscription, such real property had been conveyed to appellant Vaughn, and the record title at the time of the institution of the suit was in Vaughn, the conveyance having been made by deed from Bickford to Vaughn. When the suit was instituted, after the usual showing of the non-residence of the defendant Bickford, constructive service of summons was obtained upon him, and a writ of attachment was issued against his real property in this state. The return of the writ alleged its levy upon the property of appellant Bickford, but said property appeared of record as having been conveyed to Vaughn more than a year before. Upon such service a judgment was entered by the superior court against appellant Bickford, in the sum of \$1,037, in favor of the receiver, and in the judgment so entered it was recited that the attachment levied was a lien upon the real property of Bickford. Thereafter, the present action was instituted to cancel and set aside the conveyance from Bickford to Vaughn, as fraudulent, and to clear the rec-

ord of such conveyance, as a cloud upon the title of the plaintiff receiver. The plaintiff alleged that the conveyance was made in trust for the benefit of the grantor Bickford, and to hinder, delay, and defraud creditors. The answers of Bickford and Vaughn denied the allegations of fraud, and it was also set up affirmatively that a contract had been made in good faith, some time prior to the record of the deed, between Bickford, appellant, and one Charles Doller, in which, for a valuable consideration, Bickford had agreed to in writing to convey the real property in controversy to Doller, and a copy of such contract, upon request, was furnished to respondent before the trial. Neither appellant was personally present at the trial. After hearing the testimony, the court found that the conveyance was fraudulent, and entered a decree in accordance with the prayer of the complaint.

Numerous questions have been argued upon appeal by counsel for both parties, but, upon a careful examination of the testimony adduced upon the trial, we have concluded that the principal issue of fraud is not sustained by the evidence in the cause. It is true, there are some pertinent facts shown by respondent. At the time the contract was made between Bickford and Doller, there existed a contingent liability on his (Bickford's) unpaid subscription to the capital stock of the corporation. It was also shown that Bickford transferred his stock to a third person before he left the state. It also appeared that a house, situated upon some of the real property transferred by Bickford, was leased to a tenant who continued to send the rent to Bickford some time after the contract was made with Doller. It was also shown that Bickford had no other property in the state than that conveyed to Vaughn and which was by Vaughn conveyed to Doller, pursuant to the terms of the contract be-

tween Bickford and Doller. Opposed to any inferences from these facts was the deposition of Doller, who stated that he paid a valid consideration for the property, and specified the manner in which he paid it. Also, the corroboration of the appellant Bickford, in general, of such statement, and of Vaughn, who acted as trustee in the conveyance from Bickford to Doller. We cannot conceive how the fair weight of the testimony can sustain the finding of fraud. There do not seem to be any circumstances or facts to impeach the veracity of Doller or Vaughn. Apparently, they must be considered business men of average reputation. In fine, we cannot, from the plaintiff's testimony, fairly imply a *prima facie* case of fraud in the conveyance made by Bickford to Vaughn, and certainly, with the explicit denials and explanatory testimony on the part of the appellants, the finding of fraud against Bickford should not be permitted to stand. This conclusion is decisive of the cause. The only jurisdiction assumed to try the cause is upon the seizure of the property in controversy. No relief could go beyond the appropriation of that property to the claim of the receiver, and the failure to establish fraud in the conveyance leaves no *rem* to maintain any action. In this view, it is unnecessary to advert to the other questions discussed by counsel, including the validity of the writ of attachment levied in the first suit.

The judgment is reversed, with direction to dismiss the case.

DUNBAR, FULLERTON and ANDERS, JJ., concur.

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[No. 3573. Decided March 2, 1901.]

BAY VIEW BREWING COMPANY, *Respondent*, v. PETER
GRUBB, *Appellant*.HILLS AND NOTES — PLEADING — ALLEGATION OF CONCLUSIONS —
WAIVER OF DEMAND AND NOTICE.

An allegation in a complaint upon a promissory note against an indorser thereof that at the time of indorsement "he waived demand and notice" is not such a conclusion of law as to render the complaint demurrable for want of facts, since such allegation is one of the facts, although the facts stated may embody a conclusion as well.

SAME — PROOF ADMISSIBLE UNDER GENERAL DENIAL.

In an action against an indorser upon a promissory note, in which the complaint alleges waiver by defendant of demand and notice, the defendant may, under the general denial, prove that the waiver was not upon the note at the time of its indorsement by him, since it is necessary on plaintiff's part to prove his averment of waiver, and the general denial puts in issue all the material allegations of the complaint.

Appeal from Superior Court, Clallam County.—Hon.
JAMES G. McCLINTON, Judge. Reversed.

Trumbull & Trumbull, for appellant.

The opinion of the court was delivered by

DUNBAR, J.—This is an action upon two promissory notes, each of said notes being made a separate cause of action. No error is alleged in relation to the first cause of action. In the second cause of action is alleged execution of the note to the appellant by John Nelson and Mary Nelson, whereby they promised to pay the sum of \$474, with interest, etc. Then follows an allegation of transfer of the note by indorsement to respondent, and an allegation "that at the time of the said indorsement by the defendant he waived demand and no-

tice." To this cause of action the appellant demurred, which demurrer was overruled, and the action of the court in overruling the demurrer is alleged as error.

It is the contention of the appellant that the allegation that the defendant waived demand and notice is not an allegation of fact, but simply a conclusion of law; that, where no notice has been given and the plaintiff relied upon facts excusing such notice or showing a waiver thereof, such facts must be specifically alleged by the plaintiff; and several cases are cited to sustain the contention. But we do not think the cases cited are in point. They rather go to the extent that the facts proved must correspond with the averments. There is but one way known to the law by which demand and notice can be waived, and the defendant cannot but be apprised of what he is called upon to defend by the allegation in this complaint. It is true that the law does not countenance the pleading of conclusions, instead of alleging facts, under the provisions of the Code, but, when the fact embodies a conclusion, as it seems to us it does in this case, the provisions of the Code are not violated. It has always been held sufficient to allege, in a suit for the collection of money due on a note, that demand had been made and refused, without setting forth the words which were used in making the demand or in the refusal to pay. And yet it might be said that in that instance both the allegations of the demand and refusal were the pleading of conclusions. We think the complaint was sufficient in that respect, and that the demurrer was properly overruled.

After the plaintiff had rested and appellant was introduced as a witness in his own behalf, he testified that the words, "demand and notice waived," were not in his handwriting. He was then asked by his counsel the fol-

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lowing question: "At the time you indorsed this note 'Plaintiff's Exhibit B,' were the words waiving demand and notice there?" This question was objected to by the plaintiff, on the ground that the same was immaterial and irrelevant, and that the defendant, under his general answer, could not make any such proof, but that, if the defendant intended to rely upon such defense, it should have been specially pleaded. The objection was sustained by the court, and defendant excepted, and the action of the court in sustaining this objection is alleged as error.

We think the court erred in not permitting the defendant to testify in this regard. The waiver of notice and demand was one of the necessary averments to give a right of action against the defendant upon this note.

"Where no notice has been given and the plaintiff relies on facts excusing such notice or showing a waiver thereof, such facts must be specifically alleged by the plaintiff. This is in accordance with the rule that all the facts which constitute the cause of action must be stated by the plaintiff, and every fact on which an action depends is deemed constitutive." 14 Enc. Pl. & Pr. 1069.

If this be true, then, before the plaintiff can recover, he must prove the averments of the complaint of waiver of notice, and, under all authority, testimony which tends to dispute the constitutive averments of a complaint may be introduced under the general denial. The material allegations of the complaint, when denied either generally or specifically, determine in each case what evidence and what defenses may be given and established by the defendant. It is said by Mr. Pómeroy, in his *Code Remedies* (3d ed.), § 670:

"As the denial puts in issue all the material allegations of fact made by the plaintiff, whether originally

necessary or not, he is at liberty to introduce all and any legal evidence which tends to sustain those allegations. On the other hand, under the same issue, the defendant is entitled to offer any evidence which tends to contradict that of the plaintiff, and to deny, disprove and overthrow his material averments of fact. This is the fundamental and most comprehensive doctrine of pleading embraced in the new procedure, and it of course determines the nature of the defenses which may be set up under a general denial."

The conclusion reached, that the court erred in sustaining objections to this testimony, necessitates the reversal of the cause, and renders unnecessary a determination on the other points raised, as they will probably not arise in the re-trial of the cause.

Reversed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3779. Decided March 6, 1901.]

A. M. CANNON *et al.*, Plaintiffs, v. BEN E. SNIPES *et al.*,
Defendants, FRANK N. MCCANDLESS, Appellant,
HENRY REHMKE, Respondent.

RECEIVERS — PLURALITY OF FUNDS — PAYMENT OF CLAIMS — PLEADING — SUFFICIENCY OF PETITION.

Where a receiver appointed to take charge of the partnership, community, and individual estate of an insolvent, and authorized to first pay all the firm and community liabilities out of the partnership and community property before applying any balance thereof to the satisfaction of the insolvent's individual debts, is sought to be restrained by a firm creditor from paying a creditor of the separate estate out of the funds arising from the community estate, a cross petition of the individual creditor fails to state facts sufficient when it alleges that \$30,000 had been realized from the insolvent's separate estate and applied in discharging liens against the community realty and in paying the expenses

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of the receivership, nearly all of which expenses had been connected with the administration of the partnership estate, when there is no allegation that the money was not properly so applied under the decree, nor any allegation of unauthorized diversion of funds from one class of claims to the other, nor any allegation that there is any money in the receiver's hands, derived from the individual estate, sufficient to pay any part of the cross petitioner's claim.

SAME — ALL FUNDS AVAILABLE FOR RECEIVERSHIP EXPENSES.

Where but one receivership has been created to take charge of the firm, community, and individual estate of an insolvent, funds derived from any of such estates are available for payment of the expenses of the receivership, although the decree provided for payment of each class of creditors primarily from the corresponding class of funds.

SAME — RENTS FROM COMMUNITY REALTY — LIABILITY FOR DEBTS OF ONE SPOUSE.

Where a decree of the court appointing a receiver directs him to take charge of the community estate of an insolvent and apply the proceeds thereof to the satisfaction of community debts, such a specific lien is created against the property as to render the rents collected therefrom by the receiver community funds.

SAME — SUPERSEDING PRIOR ORDERS BY FINAL DECREE.

Where the court in an insolvency proceeding has rendered a final decree fixing the claims of all the various classes of creditors, marshalling and listing all the assets in the receiver's hands, and directing a sale thereof and the payment of the various claims according to their character out of the various kinds of property, consisting of partnership, community, and individual assets of the insolvent, such final decree supersedes a prior one in the cause, wherein the receiver was ordered to pay petitioner's claim "out of any money available in his hands so to do."

Appeal from Superior Court, Kittitas County.—Hon. JOHN B. DAVIDSON, Judge. Affirmed.

Kauffman & Frost, for appellant.

The opinion of the court was delivered by

MOUNT, J.—Some time prior to December, 1893, Ben E. Snipes and others were engaged in the banking busi-

ness in this state. On that date, at the suit of plaintiffs, the said Ben E. Snipes and others were adjudged insolvent and a receiver appointed by the superior court of Kittitas county of the estate of Ben E. Snipes & Co., of the estate of Ben E. Snipes individually, and of the estate of Snipes and wife. This receivership is still in existence. In January, 1897, a final decree was entered in the said cause, by which the court fixed the claims of all the various classes of creditors, marshalled and listed all the assets then in the receiver's hands, and directed a sale thereof and the payment of the various claims according to their character out of the proceeds of the various kinds of property, which consisted of partnership assets of Ben E. Snipes & Co., community property of Snipes and wife, and individual assets of Snipes. This decree is final in the cause, not having been vacated, modified, or appealed from, and this appeal in no way questions the validity or binding force of that decree. The contest here is between the creditors of the firm of Ben E. Snipes & Co. and a creditor of Ben E. Snipes individually, over a fund in the hands of said receiver. The respondent is a firm creditor. The appellant is the owner, by assignment, of a judgment against Snipes antedating the receivership, obtained by one MacDougall upon a surety obligation of Snipes. The appellant is a separate creditor of Snipes as distinguished from the community creditors of Snipes and wife, and an individual creditor of Snipes as distinguished from his partnership creditors. After the entry of the decree aforesaid, the respondent Rehmke, a firm creditor, presented his petition to the court, setting up the fact that the receiver had in his hands a fund derived from the sale of real property belonging to the community of Snipes and wife; that appellant had demanded the payment of his

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MacDougall claim out of this fund, and that the receiver was about to pay the same out of the fund, which was not subjected by said decree to the payment of this class of creditors; and praying that the receiver be restrained from paying the same out of said fund. Appellant thereafter, by permission of the court, filed his answer to this petition, in which he admitted the allegations mentioned and alleged the following facts by way of counter petition: That \$30,000 has come into the hands of the said receiver from the personal property of Ben E. Snipes; that there have been allowed claims as liens primarily upon community realty of Snipes and wife, and secondarily upon personal property of Snipes, amounting to \$14,596, which have been paid in full, in the payment of which the receiver used more than \$8,000 derived from personal property of Snipes; that the said claim of MacDougall, amounting to about \$4,200, was declared to be a lien upon the personal property of Snipes only. This, together with claims aggregating \$350 more, constitutes all claims against the estate of Snipes which were charges upon his separate property or that of Snipes and wife; that there are sufficient funds in the hands of the receiver to pay this MacDougall and all other claims allowed against the individual estate of Snipes; that \$22,000 derived from the personal property of Snipes has been used to pay the expenses of the receivership herein, "nearly all of which has been used for expenses of the estate of Ben E. Snipes & Co. in and about said receivership." For a further answer and counterclaim, that since final decree more than \$6,000, now in the hands of the receiver, has been realized by the receiver from rents of the community real property of Snipes and wife; and, for a further answer and counterclaim, that in November, 1894, an order was made

by the said court that the receiver pay said claim "out of any money available in his hands so to do"; that this order stood at the time of the rendition of said decree, and still stands, unmodified, in full force and effect. The respondent thereafter demurred to each of said answers, because the same does not state facts sufficient to constitute an answer or counter petition. These demurrers were subsequently sustained, and, appellant electing to stand upon his answer, the court made the order restraining the receiver from paying the MacDougall claim out of any of the proceeds of the community property of Snipes and wife. From this order appeal is taken.

It was not error of the lower court to sustain the demurrers. The first counter petition, it is true, shows \$30,000 collected from the personal property of Ben E. Snipes, and \$20,000 from the community real estate of Snipes and wife. It also alleges \$14,596 in claims, primarily against the community property of Snipes and wife, and secondarily against the property of Snipes individually, and also other claims, and that these are all the claims against the estate of Snipes personally and the community of Snipes and wife. But it does not state that there is money in the hands of the receiver, derived from this particular fund, sufficient to pay these claims, or any part thereof. There is also no allegation of unauthorized diversion of the funds from one class of claims to the other. It is alleged that more than \$8,000 of the fund derived from the personal property of Snipes has been used to discharge liens against the community realty, and \$22,000 has been used in paying the expenses of the receivership herein, and "nearly all" of this latter amount has been used for expenses attending the administration of the estate of Ben E. Snipes & Co. But it is not alleged, nor is there anything to show, that this money was not

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properly used for this purpose and as directed by the decree. There was but one receivership in that case. It is true the funds were not common for the use of each creditor or each class of creditors, but any and all of it was available to be used to pay the expenses of the receivership. This was a proper provision in the decree. It is not alleged that the receiver has not applied these funds as directed by the decree. As we read the decree, it was intended by the court that all firm liabilities of Snipes & Co. and all community liabilities of Snipes and wife should first be paid out of the proceeds of the community realty and firm property, and that the balance be applied in satisfaction of the separate debts of Snipes. It stands admitted here that the receiver is about to pay these claims out of the proceeds of the sale of the community property, and that prior claims against this fund remain unpaid, and that the total assets will not be sufficient to liquidate the same.

It is also argued that the rents derived from the community property under the receivership should be applied to the payment of this claim. Under the decision of this court in *Morse v. Estabrook*, 19 Wash. 92 (52 Pac. 531, 67 Am. St. Rep. 723), execution might issue against the rents of the community real property where a specific lien had not attached. But this fund in the hands of the receiver, who held the property for sale under a decree of the court, could no more be diverted from the channel in which the decree directed it to go than the property itself. It is the proceeds of the community property, over which the husband has no control, and is not available as separate property of Ben E. Snipes. The specific lien upon the realty created by the decree attached to the proceeds as well as to the realty.

There is no merit in the other answer, because this or-

der was superseded by the decree; and, even if it were not, it only directs payment out of the funds available for that purpose, and, unless the answer shows funds available, no cause is stated.

The judgment of the lower court is affirmed.

REAVIS, C. J., and FULLERTON, ANDERS, and DUNBAR, JJ., concur.

[No. 3803. Decided March 6, 1901.]

CARRIE M. AUSTIN, as *Administratrix*, *Appellant*, v.
AUGUSTA G. CLIFFORD *et al.*, *Respondents*.

HUSBAND AND WIFE — LANDS PURCHASED AFTER MARRIAGE — WHEN
SEPARATE PROPERTY.

The presumption that lands acquired by purchase after marriage are community property is overcome in a case where it appears that the husband, prior to marriage, had accumulated over \$23,000 worth of land in the business of buying, improving and selling real estate, of which he sold about \$20,000 worth within a year after his marriage and bought other land with the proceeds, including that in controversy, without the use of any money of his wife or of the community in the purchase of the same.

SAME — HOMESTEAD IN DECEDENT'S ESTATE — ORDER SETTING ASIDE
IN SPOUSE'S SEPARATE PROPERTY — EFFECT UPON TITLE.

A homestead set aside by the court, under Bal. Code, §§ 6219, 6222, to the widow and minor child of a decedent does not vest the title to such homestead in them, when the land exempted as a homestead was the separate property of the decedent; but such sections must be construed in connection with § 5246, by which it is provided that if a homestead was selected from the community property, the land rested in the survivor upon the death of either spouse, and "in other cases, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent."

24	172
30	40
30	41
24	172
34	90

Mar. 1901.] Opinion of the Court—MOUNT, J.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM H. H. KEAN, Judge. Affirmed.

George C. Israel, for appellant.

M. L. Clifford, for respondents.

The opinion of the court was delivered by

MOUNT, J.—This appeal is from a decree of the superior court of Pierce county in the matter of the distribution of the estate of Algernon S. Austin, Jr., deceased, husband of appellant, wherein the lower court found the property here in controversy to have been the separate property of said deceased, and distributed it as such. Algernon S. Austin, Jr., died intestate in Pierce county, October 6, 1898, leaving a widow and infant child; also two grown children by a former wife. On October 28, 1898, appellant was appointed as the administratrix of the estate of deceased, and thereafter proceeded in due course of law to settle up the said estate. Upon the hearing of the petition for final accounting and distribution of the estate, appellant claimed lot 8, block 524, of Central Addition to the city of Tacoma, as a homestead for herself and minor child, and asked that the same be excluded from the distribution and set aside to her as such homestead. The court denied the homestead claim, and from a decree distributing this property as the separate property of deceased appeal is taken.

The first question presented here is whether or not this property was the separate property of deceased. The record discloses the following facts: That deceased for several years prior to his marriage to appellant, which occurred January 1, 1890, had been engaged in buying and improving real estate and selling the same; that at the time of his marriage he had realty in and about the city of

Tacoma valued at about \$23,000. He thereafter continued in the same business and, in the language of appellant, "he just sold property, and then bought and built houses, and sold again, using his own money all the time." The property in question was purchased by deceased in December, 1890, about one year after his marriage to appellant. After his said marriage, and before he purchased the property in question, he sold of the property owned at the time of said marriage several lots, aggregating \$20,000, and that of the property purchased after marriage none had been sold at the time of the purchase of the lot in question; that no money of appellant or of the community was used in or about the purchase of this property. From these facts it is readily observed that this lot was and is separate property of deceased. Whatever presumption there may be that the property acquired after marriage by either spouse is community property is here overcome by clear and convincing proof that it is separate estate.

In the course of the administration of the estate appellant obtained an order of the court setting aside the above-described property as a homestead, and appellant now insists that this order of the court was conclusive of the rights of the heirs to the same and fixed the status of the property as the homestead of appellant. This contention is based upon §§ 6219 and 6222, Bal. Code. These sections cannot be held to vest the fee to such homestead in the widow, irrespective of the claims of other heirs. They exempt such homestead from the payment of any debts, whether community or individual, and authorize the court to set aside the use thereof for a limited period to the family of deceased. The order of the court could do no more. These sections must be read and construed in connection with § 33 of the Acts of 1895, at page 114, being § 5246, Bal. Code. By this section, if the selection had been

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Syllabus.

made from community property, the land on the death of either of the spouses would unquestionably vest in the survivor, but "*in other cases* upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent." The language here is clear and unambiguous, and requires no construction.

The cause must be affirmed, with costs against appellant in her own proper person and not against the estate.

REAVIS, C. J., and FULLERTON, DUNBAR and ANDERS, JJ., concur.

[No. 3463. Decided March 7, 1901.]

WILLIAM LEGOE, *Respondent*, v. CHICAGO FISHING
COMPANY, *Appellant*.

24	175
124	584

FISHERIES — FISHING SITE — ABANDONMENT — RIGHT OF RE-LOCATION.

Laws 1897, p. 218, § 7, which provides that, if the holder of a fishing license, who has indicated a location for his trap or pound net by driving piles and posting his license number, "fails to construct his appliance during the fishing season covered by his license, such location shall be deemed abandoned," does not preclude one who has abandoned a fishing site from re-locating thereon for the next fishing season, when no other person has acquired a prior claim thereto between the time of his abandonment and his re-location.

SAME — PRIORITIES.

Under Laws 1897, p. 218, § 7, which provides "that any person or corporation, after having obtained a license as provided for in this act, shall indicate locations for traps or pound nets made under such license, by driving at least three substantial piles thereon, which must extend at least ten feet above the surface of the water at high tide, one of said piles to be driven at each end of the location claimed, and upon said terminal piles there must be posted the license number," the plaintiff, who on the afternoon of March 16th placed temporary poles on the beach

while the tide was out and posted his license number thereon, and three days later drove substantial piles farther out, did not thereby acquire a superior right over defendant, who, on the evening of March 16th, posted its license number on its own piles already on the site, when the defendant had on the morning of that day been engaged at the site in making tests of the course of the tides by means of lines and floats, preparatory to fixing a pound net at that place,—the acts of the defendant thus being as effective as those of the plaintiff to indicate an intention to make a fishing location on the site, and the defendant being actually first in time to indicate its intention and also to literally comply with the statute.

SAME — INDICATING LOCATION — STATUTORY REQUIREMENTS.

The act of a locator of a fishing site in posting its license number upon its own piles, driven upon the site in prior years, constitutes a literal compliance with the requirement of the statute that locations for pound nets shall be indicated "by driving at least three substantial piles thereon," and posting the license number upon the terminal piles, since the statute does not require the act of driving the piles and the act of posting notices thereon to be concurrent.

Appeal from Superior Court, Whatcom County.—Hon. HIRAM E. HADLEY, Judge. Reversed.

Kerr & McCord, for appellant.

Dorr & Hadley, for respondent.

The opinion of the court was delivered by

FULLERTON, J.—The parties hereto are rival claimants to a fishing location situate in the waters of Puget Sound off the west side of Lummi Island, at a place known as "Legoe's Point." The place in controversy was first located by the appellant in 1895, and from that time down to and including the 15th day of March, 1898, it maintained piles upon the location, driven to mark the site, and kept posted thereon the numbers of its fishing licenses issued to it by the fish commissioner of the state of Washington, pursuant to the act of February 10, 1893 (Session

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Laws 1893, p. 15). On March 2, 1898, the appellant procured a license under the act of March 16, 1897 (Session Laws 1897, p. 214), and on the morning of the 16th of March, 1898, its manager and certain of its employees were at the site, engaged by means of lines and cork buoys or floats in making tests to ascertain the direction of the tides, preparatory to driving a trap known as a "pound net," leaving at noon of that day. On the evening of the same day they returned and posted the new license number on piles that had been driven on the site the year before. Between the time the appellant's employees left at noon and their return on the evening of the same day the respondent went to the location, and by digging holes in the sand with a shovel set three piles or stakes on a line pointing from the shore towards deep water. The pole nearest the shore was set near the line of high water mark, the second about twenty-five feet distant therefrom, and the third some twenty-five feet distant from the second; all of them being above the line of low tide. On the terminal poles he posted his license number. Subsequently, on the 19th of the same month, the respondent went upon the location with a pile driver and drove three piles extending from below the line of low tide towards deep water, posting his license number on the terminal piles so driven, making a valid location, if the site was open to location at that time. Subsequently the appellant undertook to drive a trap on the site, and this action was brought to determine the priority of the respective rights of the parties.

Neither the act of 1893 nor that of 1897 authorized the fish commissioner to issue a license to fish at any designated locality. The license authorized was what is termed a "roving license." It granted to the holder a general right to construct a trap at any place in the waters of the

state not expressly prohibited, and the priority of the right of a license holder to fish at a designated locality was left to be determined by priority of occupation; that is, the superior right belonged to him who first indicated, in the manner pointed out by the statute, his intention to construct a trap at the particular place. Under the law of 1893 this intention had to be indicated by the construction of a trap, while under the law of 1897 such intent could be indicated by "driving three substantial piles thereon, which must extend not less than ten feet above the surface of the water at high tide, one of said piles to be driven at each end of the location claimed, and upon said terminal piles" posting his license number. Neither of the acts provided for the renewal of a license, nor did either of them grant to the holder of a license who had constructed a fishing appliance at a particular place a preference right to relocate the same site for the coming fishing season. The evident intent of the legislature in passing the acts in question was to grant to the license holder an exclusive right to the particular site where he constructed, or indicated his intention to construct, the fixed appliance authorized, for a limited time only, extending at most not longer than the date of the expiration of the license, leaving the site open to be taken by the first comer after the expiration of the period. The site in controversy was, therefore, even if it be conceded that the appellant had a valid location up to midnight of March 15, 1898, open to location on the 16th day of that month by any person holding a license, and having the qualifications prescribed by the statutes.

It is the respondent's contention that the appellant was disqualified from relocating the site because it had a valid location thereon during the fishing season of 1897, and had failed to construct its appliance during that season.

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This contention is based upon the statute of 1897, which provides that (§ 7) "if the locator [that is, the person who has indicated his location by driving piles and posting his license number thereon] fails to construct his appliance during the fishing season covered by his license, such location shall be deemed abandoned"; and the argument is that an abandonment of a location by a locator disqualifies and precludes him from relocating the same site, even though he may be otherwise qualified and be the possessor of a live license issued by the fish commissioner. We cannot think that this clause of the statute was intended to have the effect contended for. The act was general, and applied to all the public waters over which the state had jurisdiction. In some of these waters at least, if not in all of them, there is a regular fishing season, confined to certain months of the year, which, while varying slightly with the different years, recurs with substantial regularity. The license authorized by the act ran for one year. It was issued at and bore date from the time application was made for it, regardless of the actual fishing season. It would seem from this that the legislature intended by the clause of the statute in question to fix the end of the actual fishing season, instead of the date of the expiration of the license, as the limit of time for which an indicated location could be held without the construction of a fishing appliance. But, whatever may be the true construction of the statute, the courts should be slow to give it a meaning which would forever bar one citizen from fishing at a particular place, while leaving it open to others. The right to fish in the public waters, in the absence of express prohibitory legislation, is a right common to all of the citizens of the state; and while the legislature has ample power to regulate the right, or grant it to one to the exclusion of others, for a limited time at least,

the statute expressing such intent must have the directness and certainty of a penal statute, or at least not be capable of a different construction, before it will be given that effect.

In support of his position, the respondent calls our attention to the federal statute relating to the location of mining claims, and to the reasoning of Mr. Lindley and Mr. Morrison, wherein they contend that a locator of a mining claim who fails to do the assessment work required by the statute is barred from relocating the same claim as a new location. Lindley, *Mines*, § 405; Morrison, *Mining Rights*, 94 (9th ed.). A careful examination of their arguments, however, has failed to convince us of the correctness of the conclusions reached. It seems to us that the better reasoning is with the case of *War-nock v. DeWitt*, 11 Utah, 324 (40 Pac. 205), where it is held that the failure to do the assessment work within the required time does not bar the right of the original locator to make a new location on the same ground after it has reverted to the public.

It is not seriously contended that the respondent, by implanting the poles on the beach and posting his license number thereon on the afternoon of March 16th, perfected a valid fishing location under the statute. The claim is that these acts were sufficient to give notice of an intent to locate the particular site, and entitled the respondent to a reasonable time thereafter to perfect his location, which he did by driving piles, and posting his license number thereon, on the 19th of the same month. Had the respondent been first in time on the ground on the 16th of March, there would be much force to his contention, and we would be inclined to hold his right superior to a subsequent locator, even though such subsequent locator had made a literal compliance with the statute between

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the time he was first there and the time he perfected his location. But he was not the first in time. During the morning of the 16th, the appellant, by its officers and employees, was there, making tests of the course of the tides; acts as effective to indicate its intent to making a fishing location on the site as were the acts of the respondent. The priority of the right to the site therefore must be determined from the effect of the act of the appellant on the evening of March 16th, when it sought to perfect its location by posting its license number on piles then standing on the site, driven by it during the preceding year. It is said that this was insufficient to perfect a location; that, inasmuch as the statute prescribes that a location shall be indicated by *driving* piles, and posting thereon the license number, it is not a compliance with the statute to post the license number on piles theretofore driven; in other words, that the acts of driving and posting must be concurrent in point of time. We think this a too narrow construction of the statute. It is not denied that the piles on which the license was posted were substantial, and extended the proper distance above the surface of the water at high tide, nor can it be denied that they were the property of the appellant. Being its property, the appellant had the right to their use for any purpose. It could thus lawfully use them to indicate a fishing location; and had it drawn them from the places where they were standing and then driven them in the same places and posted its license number on the terminals thereof, it would have been, even under the respondent's contention, a valid indication of a fishing location. But such an act would have been useless, and the law rarely requires useless things to be done. More than this, the statute does not in terms require that the act of driving the piles and the act of posting the notices thereon shall be concurrent, and,

if it be a literal compliance with the statute that is required, the appellant, by driving piles at one time and posting its notice at another, made such literal compliance.

The conclusions we have reached render it unnecessary to discuss other questions suggested by the record. The judgment of the lower court is therefore reversed, and the cause is remanded with instructions to enter judgment for the appellant.

REAVIS, C. J., and DUNBAR and ANDERS, JJ., concur.

[No. 3645. Decided March 7, 1901.]

24	182
30	176

FRANK DORAN, *Respondent*, v. CITY OF SEATTLE, *Appellant*.

TRESPASS RESULTING IN CONTINUED NUISANCE—ACTION FOR DAMAGES—LIMITATIONS.

Where a city in the improvement of a street constructed a bulkhead so negligently that it gradually gave way and encroached upon the premises of an adjoining lot owner to such an extent as to cause injury to a house situated thereon, the trespass constitutes an injury in the nature of a continuing nuisance, for which the party injured may recover accrued damages as often as he brings action therefor, and is not restricted to a single action to recover present and prospective damages; and hence the statute of limitations would not begin to run from the inception of the injury.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

W. E. Humphrey and Edward Von Tobel, for appellant.

John F. Dore, John W. Kelley, James J. McCafferty and J. S. Mulvey, for respondent.

Mar. 1901.] Opinion of the Court—DUNBAR, J.

The opinion of the court was delivered by

DUNBAR, J.—The plaintiff, Frank Doran, alleges that the defendant, the city of Seattle, negligently constructed a bulkhead in front of his premises, and on account of such negligence the bulkhead pressed against and injured his house. This suit was begun on the 24th day of January, 1898. The plaintiff's claim for damages was filed on the 13th day of September, 1897. On the trial, after the plaintiff had introduced his evidence, motion for non-suit was made by defendant and denied by the court. The jury returned a verdict in favor of the plaintiff. The question involved in this appeal is in relation to the statute of limitations, and that question is raised by the following instructions asked by the defendant:

"The plaintiff can have but one cause of action for damages under the facts of this case, and in the one action the plaintiff is entitled to recover for all damages, if at all, sustained by him, both past and prospective. The cause of action, if any, accrued to the plaintiff at the time of the first damages—no matter how small they may have been—that he sustained; and unless a claim for past and prospective damages was presented to the city council and filed with the clerk of the defendant within six months after the time the cause of action accrued, and the action was commenced within two years after the first damages were sustained, there can be no recovery, and your verdict must be for the defendant."

"The statute requires actions for damages such as are claimed in the complaint to be commenced within two years after the right of action has accrued. If you find that the damages accrued to plaintiff's property more than two years before the commencement of this action, no matter how small that damage may have been, then the whole claim is barred by the statute of limitations, and your verdict must be for the defendant. The law will not

permit the plaintiff to split his cause of action and to recover by piecemeal; but he must recover, if at all, for all damages, past and prospective, in one single action."

These instructions the court refused to give, but instructed as follows:

"If you believe, from a preponderance of the evidence in this case, that in building and maintaining the bulkhead in question the defendant has not used such care as ordinarily prudent city officials, having similar work in charge, generally exercise in erecting and maintaining entirely similar bulkheads, and that through such failure the house of plaintiff was, within six months immediately prior to the giving of this notice of claim of plaintiff to defendant, injured by the gradual sliding of said bulkhead, then your verdict will be for plaintiff in one such gross sum as will, in your opinion, from the evidence, just compensate plaintiff for such injury as so accrued within said six months immediately prior to the filing of said plaintiff's claim with defendant."

It is insisted by the appellant that, according to the instructions given by the court, the statute of limitations began to run from the time the injury ceased, and not from the time the right of action accrued; that the case was tried upon this theory, which was an erroneous one. Passing the question of the legality of the statute in relation to the presentation of claims before the commencement of the action and within a certain time after the damages had occurred, we will proceed to the main question involved, which is decisive of the case, granting, for the sake of argument, that the filing of the claim was necessary.

There are a few cases which support the theory of defendant that the statute of limitations begins to run from the inception of the injury. In *Powers v. Council Bluffs*, 45 Iowa, 652 (24 Am. Rep. 792), it was held that whenever a nuisance is of such a character that its continuance is necessarily an injury, and when it is of a

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permanent character that will continue without change from any cause but human labor, then the damage is an original damage, and may be at once fully compensated. In *Town of Troy v. Cheshire R. R. Co.*, 23 N. H. 83 (55 Am. Dec. 177), the same doctrine was announced, although in that case it was held that if the act done was not necessarily injurious, or if it was contingent whether further injury would arise, the plaintiff could recover damages only to the date of his writ. In this connection it might be said that it would be difficult to tell in the case at bar whether the injury would continue, and, if so, to what extent. In *Fowle v. New Haven & Northampton Co.*, 107 Mass. 352, it was held that a judgment against a railroad corporation for damages, not limited to those actually suffered at the date of the writ, for locating and constructing their road on the bank of a river, so as to divert its course and cause it to wash away the plaintiff's land, is a bar to a like action by him against them for subsequent damages from the same cause. But it will be observed that in this case the decision was placed upon the ground that the damages in the other case had not been limited to those suffered at the date of the writ, and the rule contended for by the appellant cannot be said to have been adopted in Massachusetts, as, in the subsequent case of *Prentiss v. Wood*, 132 Mass. 486, it is held that an action for damages sustained within six years by the wrongful continuance of a dam is not barred by the statute of limitations, although the dam was erected without right more than six years before the date of the writ; the court in that case saying:

"The ground taken by the defendants, that these suits are barred by the statute of limitations, cannot be maintained. A person who continues a nuisance is liable to successive suits, each continuance being a new nuisance,

and therefore the plaintiff in these actions is entitled to recover for all damages accruing after the award above referred to, it being within six years of the date of his writs"; citing *Hodges v. Hodges*, 5 Metc. (Mass.) 205.

The same doctrine was announced in *Wells v. New Haven & Northampton Co.*, 151 Mass. 46 (23 N. E. 724, 21 Am. St. Rep. 423), and the question of permanency, upon which some of the courts have distinguished the cases, was discussed as follows:

"If the defendant's act was wrongful at the outset, as the jury have found, we see no way in which the continuance of its structure in its wrongful form could become rightful, as against the plaintiff, unless by release or grant, by prescription, or by the payment of damages. If originally wrongful, it has not become rightful merely by being built in an enduring manner."

And the court noticed the decision in *Fowle v. New Haven & Northampton Co.*, *supra*, and distinguished it from the case it was then deciding by saying:

"The plaintiff [in that case] had brought a former action in which he expressly declared for prospective damages, and he was allowed by the court to recover them, apparently without any objection on this ground from the defendant; and if he had been allowed to hold his second verdict he would have got double damages, which clearly was not permissible. The decision of that case does not necessarily imply that an action must have been brought within six years, or if it does, we cannot follow it; . . ."

The case upon which appellant largely relies is that of *North Vernon v. Voegler*, 103 Ind. 314 (2 N. E. 821), and the opinion, having been written by Judge ELLIOTT, who is recognized by the bar of this country as a learned author and jurist, demands particular attention. In that case it was squarely held that in an action for injury to real estate caused by the negligence of corporation officers

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in constructing a public work of a permanent character, as the grading of a street, all damages, past and prospective, can be recovered in one action; that they must be recovered in one suit; and that, for fresh damages resulting from the original wrong, a second action cannot be maintained. A very vigorous opinion is written in that case, but with due deference to the eminent judge who wrote the opinion, we are inclined to think that both reason and authority concur in overruling the rule there announced.

In *Uline v. New York Central, etc., R. R. Co.*, 101 N. Y. 98 (4 N. E. 536, 54 Am. Rep. 661), where an elaborate and painstaking investigation of this question was indulged in and the authorities collated, it was decided that where a railroad is unlawfully constructed in a street, in an action by an adjacent owner to recover damages, he is entitled to recover simply the damages sustained up to the commencement of the action, and that for any damages thereafter sustained, other actions might be brought successively until the nuisance should be abated. In the discussion of this question Judge EARL, who wrote the opinion for the court, in noticing the case of *North Vernon v. Voegler, supra*, and after discriminating that case to a certain extent from the one in question, said:

“But the case is also inferentially authority for the second ground of error upon which I have based my conclusion. . . . But I am of opinion that that decision is clearly unsound as to the precise question adjudged. What right was there to assume that the street would be left permanently in a negligent condition and then hold that the plaintiff could recover damages upon the theory that the carelessness would forever continue? A municipality or a railroad corporation under proper authority may erect an embankment in a street, and if the work be carefully and skillfully done it cannot be made liable for the consequential damages to adjacent property.

But if it be carelessly and unskillfully done, it can be made liable. It may cease to be careless, or remedy the effects of its carelessness, and it may apply the requisite skill to the embankment, and this it may do after its carelessness and unskillfulness and the consequent damages have been established by a recovery in an action. The moment an action has been commenced, shall the defendant in such a case be precluded from remedying its wrong? Shall it be so precluded after a recovery against it? Does it establish the right to continue to be a wrong-doer forever by the payment of the recovery against it? Shall it have no benefit by discontinuing the wrong, and shall it not be left the option to discontinue it? And shall the plaintiff be obliged to anticipate his damages with prophetic ken and foresee them long before, it may be many years before they actually occur, and recover them all in his first action? I think it is quite absurd and illogical to assume that a wrong of any kind will forever be continued and that the wrong-doer will not discontinue or remedy it, and that the convenient and just rule, sanctioned by all the authorities in this state, and by the great weight of authority elsewhere, is to permit recoveries in such cases by successive actions until the wrong or nuisance shall be terminated or abated."

And it may be added that, under the logic of the doctrine announced in the Indiana case, the wrong doer might, by the payment of prospective damages, actually become permanently possessed of real property which, under the theory of the law, can only be taken by corporations under the provisions of the law in relation to eminent domain. In addition to this, the rule is inequitable, in that the damages in the first instance and before the statute of limitations expires may be so trifling that it would not justify litigation. It would be inequitable and not in accordance with good morals to estop a person from obtaining his rights or damages for injuries which might eventually become burdensome, because he was not

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litigious enough to plunge into a law suit over a trifling matter. It is said by the appellant that the cases cited above are not in point for the reason that the wrongs committed were nuisances; but an examination of the many cases on this subject shows that they are treated in all instances as nuisances when they are wrong, and that the construction of that which is originally legal and right, if wrongfully constructed and maintained, may become a nuisance. Under the title "Trespasses Resulting in Continued Nuisances," it is said in 5 Am. & Eng. Enc. Law, p. 17:

"The rule here is a combination of the two rules just given. The institution of the wrong is treated as a trespass, while the continuance of it is treated as a nuisance. The damages for the original act of trespass are all to be recovered in the first action, but successive actions must be brought to recover for damages for the continuation of the wrongful conditions, and in these the damages are estimated only to the date of the bringing of each suit."

In *Aldworth v. Lynn*, 10 L. R. A. 210 (26 N. E. 229, 25 Am. St. Rep. 608), the rule of continuing damages was announced; the contention of the plaintiff in that case being that, if the damage resulted from a cause which was either permanent in its character or which was treated as permanent by the parties, it was proper that the entire damages should be assessed with reference to past and probable futures. The attorney in that case cited *Fowle v. New Haven & Northampton Co.*, *supra*, and *Troy v. Cheshire R. R. Co.*, *supra*, and the court in its opinion said:

"So far as there are intimations in the opinions of *Fowle v. New Haven & N. Co.*, which seem to make the case an authority for the plaintiff's contention in the case at bar, we are not inclined to follow them."

In *Mayor of Nashville v. Comer*, 7 L. R. A. 465 (12

S. W. 1027), it was held that damages for an alleged negligent construction of a sewer, in consequence of which plaintiff's premises are injured by discharge therefrom, must be limited to the actual damage sustained up to the time of bringing suit, and cannot include prospective damages on the ground that the defects are permanent, although human labor will be necessary to remedy the defects. In this case the same cases were cited, viz., *Troy v. Cheshire R. R. Co.*, *supra*, and *Powers v. Council Bluffs*, *supra*, to sustain the doctrine that all the damages must be included in one suit, and the court in passing upon that question, after laying down the rule that damages could be assessed only up to the time of the writ, and after reviewing the arguments in the cases cited to sustain the opposite contention, among other things said:

"This seems to us an artificial and arbitrary test. There are supposable nuisances, which, by the effect of time, might at last abate themselves, but by far the greater number of trespasses, wrongs and nuisances would continue indefinitely, without the expenditure of human labor to remove or abate them. It is a rule which does not recommend itself by either its reasonableness, its certainty of application or its justice."

And, after noticing the rule announced in *Troy v. Cheshire R. R. Co.*, *supra*, and *Powers v. Council Bluffs*, *supra*, it continued:

"Thus the application of the rule now contended for would require a plaintiff to foresee all the possible results, and to convince a jury of what he, with prophetic ken, is required to foresee, on penalty of subsequently having to quietly endure consequences which he could not reasonably have conjectured as likely to result from what at first seemed a trifling injury. The cases of *North Vernon v. Voegler*, 103 Ind. 314, and *Fowle v. New Haven & N. Co.*, 112 Mass. 334, have been examined, and we find

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Syllabus.

that they do measurably support the contention of defendants in error. None of these cases are satisfactory in their reasoning and the decided weight of authority is opposed to them."

See, also, *Blunt v. McCormick*, 3 Denio, 283; *Greene v. New York Central, etc., R. R. Co.*, 65 How. Pr. 154; *Powers v. Ware*, 4 Pick. 106; *McGuire v. Grant*, 25 N. J. Law, 356 (67 Am. Dec. 49); *Schell v. Plumb*, 55 N. Y. 592; *Mahon v. New York Central, R. R. Co.*, 24 N. Y. 658.

The rule contended for by appellant, it seems to us, would work unnecessary hardship, is fraught with doubt and uncertainty in its application, and we are not inclined to adopt it. The instructions of the court were without error, and the judgment is therefore affirmed.

REAVIS, C. J., and FULLETON and ANDERS, JJ., concur.

[No. 3671. Decided March 7, 1901.]

W. G. TAYLOR, *Respondent*, v. CITY OF BALLARD, *Appellant*.

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MUNICIPAL CORPORATIONS — DEFECTIVE STREET — ABSENCE OF RAILING — NEGLIGENCE.

Where a city maintains a street, elevated from three and one-half to six feet above the adjacent land, without a guard rail to protect teams from shying off the roadway in case of fright, it is liable for negligence when a gentle horse, driven with ordinary care by an experienced driver, becomes frightened at the sight and noise of escaping steam blown off at that point of the street through pipes passing thereunder from an electric power house operated by the city, and backs the buggy to which it is harnessed off the roadway, causing serious injuries to the driver.

SAME — INSTRUCTIONS — REASONABLE AND ORDINARY CARE.

An instruction which charges a jury that the law imposes on municipalities the duty of ordinary care in maintaining their

streets in safe condition for ordinary travel is not erroneous on the ground that the law merely requires the exercise of reasonable care in such cases, since there is no distinction between ordinary care and reasonable care.

ACTION FOR PERSONAL INJURIES — PERMANENCY OF INJURY — PLEADING AND PROOF.

The admission of testimony by physicians that plaintiff in an action for personal injuries would probably never recover his health again was not erroneous, under a complaint alleging that he would be incapacitated from doing his work for the period of two years, when the complaint further alleges that plaintiff was permanently injured and would continue to suffer for the remainder of his natural life great bodily pain and mental anguish.

SAME — ARGUMENT OF COUNSEL.

In an action to recover damages for personal injuries, a statement by counsel that plaintiff "tells you the truth when he tells you he will not be able to get married, and I submit the proof shows that he is incapacitated from contracting the marriage relation," would not be prejudicial error, on the ground of improper argument of counsel, when the record shows that the statement was warranted by the testimony of plaintiff.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

Wilmon Tucker, Ivan L. Hyland and John W. Peter,
for appellant:

Upon the point that the court permitted improper argument to the jury, counsel cite *Brown v. Swineford*, 44 Wis. 282 (28 Am. Rep. 582); *St. Louis, I. M. & S. Ry. Co. v. Warren*, 48 S. W. 224; *Galveston, H. & S. A. Ry. Co. v. Cooper*, 8 S. W. 68; *Galveston, H. & S. A. R. R. Co. v. Kutac*, 11 S. W. 127; *Heddles v. Chicago & N. W. Ry. Co.*, 42 N. W. 237; *Dillingham v. Scales*, 14 S. W. 566; *Andrews v. Chicago, M. & St. P. Ry. Co.*, 71 N. W. 372; *Robertson v. Madison*, 29 Atl. 777; *Haynes v. Trenton*, 18 S. W. 1003; *Geist v. Detroit City Ry. Co.*, 51 N. W. 1112; *Tucker v. Henniker*, 41 N. H. 317; *State*

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v. Smith, 75 N. C. 306; *Gulf, C. & S. F. Ry. Co. v. Butcher*, 18 S. W. 583; *Indianapolis Journal Newspaper Co. v. Pugh*, 33 N. E. 991; *Houston & T. C. Ry. Co. v. O'Hare*, 64 Tex. 600.

The law requires municipalities to exercise only reasonable care in cases of this kind, and does not impose upon them the use of ordinary care in maintaining and keeping their streets and sidewalks in a safe condition. *Fogg v. Nahant*, 106 Mass. 278; *Rowell v. Lowell*, 7 Gray, 100 (66 Am. Dec. 464); *Barber v. Roxbury*, 11 Allen, 318; *Chicago v. McGiven*, 78 Ill. 348; *Jenks v. Wilbraham*, 11 Gray, 142; *Kiddier v. Dunstable*, 7 Gray, 104; *Day v. Mt. Pleasant*, 30 N. W. 853; *Chicago v. Bixby*, 84 Ill. 83 (25 Am. Rep. 429); *Van Pelt v. Clarksburg*, 24 S. E. 878; *Yeager v. Bluefield*, 40 W. Va. 484 (21 S. E. 752); *Hubbard v. Concord*, 35 N. H. 52 (69 Am. Dec. 520); Elliott, *Roads and Streets*, § 448; Angell, *Highways* (2d ed.), p. 388, note 2.

As to liability for lack of railings or barriers on side of road, counsel cite *Bell v. Wayne*, 48 L. R. A. 644 (82 N. W. 215); *Doak v. Saginaw Township*, 119 Mich. 680 (78 N. W. 883).

P. V. Davis and *William A. Gilmore*, for respondent:

It is the duty of municipalities to exercise reasonable care and diligence to see that highways are constructed and maintained in a safe condition for ordinary travel, in the ordinary methods, and to know and foresee that its streets will be constantly traveled by persons driving animals with the characteristics and propensities of the horse; and if, with such knowledge, this accident might have been and ought to have been foreseen, and with reasonable diligence on the part of the officers of the city could have been guarded against and prevented, then the failure of the city to guard against the accident was neg-

ligence, and such negligence was the proximate cause of the injuries to plaintiff. 1 *Sutherland, Damages* (1883 ed.), pp. 38-47; *Yoders v. Amwell Township*, 33 Atl. 1017 (51 Am. St. Rep. 750); *City Council of Augusta v. Hudson*, 21 S. E. 289; *Rohrbough v. Barbour County Court*, 20 S. E. 565 (45 Am. St. Rep. 921); *Simons v. Casco Township*, 63 N. W. 500; *Gage v. Pontiac, O. & N. R. R. Co.*, 63 N. W. 318; *Village of Carterville v. Cook*, 16 Am. St. Rep. 248 (4 L. R. A. 721); *Palmer v. Inhabitants of Andover*, 2 Cush. 600; *Rohde v. Chicago & N. W. Ry. Co.*, 56 N. W. 872; *Yeaw v. Williams*, 15 R. I. 20; *Ouversen v. Grafton*, 65 N. W. 676; *Sturgis v. Kountz*, 30 Atl. 976 (27 L. R. A. 390); *Board of Commissioners of Parke County v. Sappenfield*, 33 N. E. 1012; *Town of Fowler v. Linquist*, 37 N. E. 133; *Union St. Ry. Co. v. Stone*, 37 Pac. 1012; *Joliet v. Shufelt*, 32 N. E. 969 (18 L. R. A. 750, 36 Am. St. Rep. 453); *Crockett v. Village of Barre*, 66 Vt. 269; *Byerly v. Anamosa*, 44 N. W. 359; *Carleton v. Inhabitants of Caribou*, 34 Atl. 269; *Eads v. Marshall*, 29 S. W. 170.

Upon the question of the latitude allowed in argument to the jury, counsel cite *Columbia, etc., R. R. Co. v. Hawthorne*, 3 Wash. T. 353; *State v. Regan*, 8 Wash. 511; *Chezum v. Parker*, 19 Wash. 645; *State v. Hamilton*, 55 Mo. 520; *Higley v. Gilmer*, 3 Mont. 433; *McLain v. State*, 24 N. W. 720; *Bradshaw v. State*, 22 N. W. 361; *Proctor v. De Camp*, 83 Ind. 559; *Festner v. Omaha, etc., Ry. Co.*, 22 N. W. 557; *People v. Barnhart*, 59 Cal. 402; *Morrison v. State*, 76 Ind. 335; *Anderson v. State*, 4 N. E. 63; *Shular v. State*, 4 N. E. 870 (55 Am. Rep. 211); *Scott v. Chicago, etc., Ry. Co.*, 27 N. W. 276; *Thompson, Trials*, § § 957, 962-964, 978.

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The opinion of the court was delivered by

DUNBAR, J.—This is an action for damages for personal injuries alleged to have been suffered by the plaintiff while driving on an elevated road in the city of Ballard. The verdict was for the plaintiff in the sum of \$10,000, which was reduced by the trial court, on motion for a new trial, to \$9,750. From that judgment this appeal is taken.

The accident occurred opposite the city water works and electric light plant, which were constructed by the city several years before the accident, and ever since have been, and are now, operated by the city of Ballard, at a place where the road was not guarded on either side. At the place where the accident occurred the road was elevated about four feet on the side next the water works and light plant, and from three and one-half to six feet on the other side next the bay,—the side where the plaintiff fell off the road. The road is the principal traveled road between Ballard and Fremont. The plaintiff was driving on this road about eight o'clock in the afternoon of April 24, 1899, with a horse hitched to a buggy. The horse is shown to have been a gentle horse and accustomed to being driven by ladies. It appears that the plaintiff had never been over this part of the road before. The testimony showed that he was a reasonably experienced driver, but the night was dark and he did not know that the road was elevated or unguarded at that place. There had been, before the accident, a stringer four inches by six inches wide nailed to the planking along the outer edge of the road; but this slight protection had been missing for six months prior to the accident, so that the road was absolutely unprotected for a distance of about thirty-five feet. There were two pipes leading from the pump house under the road, and the officers who were running the light

plant were in the habit of blowing off steam through these pipes from the cylinder cocks of the light plant in the evening about the time the plaintiff was passing. This steam arose from both sides of the road, sometimes blowing across the road, and this was the condition on the evening of the accident. As plaintiff approached the pump house and electric light plant he stopped his horse to permit a lady bicyclist to pass, when he immediately started forward. It does not appear, however, that the horse became frightened at the bicycle. At this time, also, some small animal ran across the road in front of the horse, and it is contended by the appellant that the testimony does not show whether it was the steam from the pipes, or the animal, which scared the horse, but the testimony of the plaintiff is to the effect that the animal ran across the road after the horse was frightened by the steam, and, if his testimony be true, the animal had nothing to do with scaring the horse. But the noise at the pump house and a cloud of vapor which arose from the left side of the road attracted the attention of the horse, and it refused to go ahead. Just at that time another cloud of vapor arose from the other side, and the horse began to back, and backed the buggy over the side of the road and into the drift wood below. The respondent testified that when he felt the wheels dropping over the embankment he tried to save himself by attempting to jump from the buggy, but did not succeed in getting out. He was thrown violently among the drift wood where he was found an hour or so afterwards, lying in an unconscious condition, about three feet from the tide, which was coming in.

Many assignments of error are made, which we will not undertake to follow *seriatim*. It seems to us that the principal question in this case, viz., whether the city was

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responsible for the condition of the road which was the cause of the injury, was decided by this court against appellant's contention in *White v. Ballard*, 19 Wash. 284 (53 Pac. 159), where the plaintiff recovered for an accident which befell her while driving in a buggy when the horse took fright from several bicycles on an eight-foot planking, causing it to back off of the planking to the depression below, there being no guard rail where the accident occurred. This court in that case said:

"The question of negligent construction and condition of the street, upon these facts, was certainly one for the jury, and there is substantial evidence to sustain their deduction of such negligence. The bicyclists who occasioned the fright of the horse were not guilty of any negligence or wrong. It was, then, a question for the jury to determine whether the negligent condition of the street was the proximate cause of the injury. We are satisfied with the instructions of the superior court given to the jury upon the question of negligence. It would be of but little value to review the almost infinite number of cases upon this question. Streets must be so constructed that the ordinary horse, with the ordinary disposition, allowing for the ordinary incidents of caprice or fright, can be driven with reasonable safety on them."

This language, if applied to the case under discussion, would work an affirmance of the judgment. The street or road in this instance, under the testimony of the plaintiff, at least, was not so constructed that the ordinary horse with the ordinary disposition,—and it was shown that the horse which the plaintiff was driving was a gentle horse,—could be driven with reasonable safety. The condition of things shown by the testimony in this case would frighten almost any horse. The noise of the power house, conjoined with the sputtering and hissing of the steam as it escaped from the pipes, would have a tendency to excite even a very gentle horse.

The appellant relies upon *Teater v. Seattle*, 10 Wash. 327 (38 Pac. 1006), but that case is not controlling under the circumstances of this case. There, it is true, the team was killed and the buggy injured in an attempt to make a turn on a bridge forming part of a public drive way, by running off the edge of the bridge, which was constructed without a railing; but the theory upon which that case was decided was that the team had become unmanageable and had run a long distance,—a mile or such a matter,—before the accident occurred, and that the fact of the team becoming unmanageable was not attributable in any manner to any defect in the street, but was from an independent cause, viz., the unmanageable disposition of the horses,—an entirely different proposition from the one involved in this case.

It is insisted that the court erred in allowing Dr. Sloan, the attending physician, to testify as to what his opinion was as to the probability of the plaintiff ever recovering his health again, for the reason that under the allegations of the complaint it was irrelevant, immaterial, and incompetent, because the complaint alleged that the plaintiff would be incapacitated from doing his work for the period of two years, and that it was, therefore, improper to allow the witness to testify that he was permanently injured. But in addition to the allegations quoted by the appellant, the complaint, in paragraph 8, alleges that plaintiff was permanently injured and that, on account of such injuries, he would continue to suffer for the remainder of his natural life great bodily pain and mental anguish. There seems to us to be nothing inconsistent in these allegations, for the plaintiff might be incapacitated from doing any work for two years, and yet, by reason of a permanent injury, be rendered more or less inefficient for the remainder of his life. But, in any event,

the evidence was sufficient to justify a conclusion by the jury that the plaintiff was permanently injured, and under the provisions of Ballinger's Code, § 6535, all amendments will be considered made that ought to have been made, and the pleading will be treated as amended in accordance with the testimony. *Allend v. Spokane Falls & N. Ry. Co.*, 21 Wash. 324 (58 Pac. 244).

We think there was no error in admitting the testimony of Dr. Adams as to his opinion of the probable recovery of the plaintiff from the accident.

The fourth allegation of error is the refusal of the court to grant defendant's motion for a nonsuit. The motion was properly denied. There was sufficient testimony as to the causes which frightened the horse to go to the jury. It is insisted by the appellant that the fact that the road had been used daily by hundreds of people for a period of three years without any accident was the strongest evidence that could be introduced that the road was in a reasonably safe condition. In addition to the fact that this was an argument which would have been more properly addressed to the jury, the plaintiff offered to prove that other accidents had occurred at this place, but was not permitted to do so. The allegations as to the proximate cause were sufficient. *Allend v. Spokane Falls & N. Ry. Co.*, *supra*.

Counsel for appellant strenuously insists that the court erred in allowing counsel for the respondent to indulge in improper statements to the jury, which are criticised as inflammatory, intended to arouse the prejudices of the jury by illegitimate considerations. The only statement which was properly objected to is the statement of the counsel which culminated in the following remark: "And Mr. Taylor tells you the truth when he tells you he will not be able to get married, and I submit the proof shows that

he is incapacitated from contracting the marriage relation." And on objection it was stated by the court that it was proper matter for argument to the jury. Many cases are cited by appellant to sustain his contention. In the very nature of things, the remarks passed upon by the appellate courts have all been different, and it is impossible to lay down a rule that will govern particular cases. For this reason large discretionary powers are conceded to trial courts, who are surrounded with the atmosphere of the trial and are better able than the appellate court to tell what remarks would have prejudicial effects on the minds of the jury. None of the cases cited by the appellant seem to us to control the case at bar. In *Ferguson v. State*, 49 Ind. 33, which was the trial of a man for murder, during the progress of the argument for the state, counsel commented on the frequent occurrence of murder in the community, and the formation of vigilance committees and mobs, and said that the same was caused by the laxity of the administration of the laws, stating to the jury that they should make an example of the defendant. This was held to be reversible error, and, we think, very properly so; for, as was said by the court:

"It was tantamount to saying to the jury, murders have been committed, vigilance committees formed, and mobs assembled in this county, and you may take these matters into consideration in making your verdict; and as you have got a chance now, you may make an example of defendant."

This was an appeal to popular prejudice, and a direct attempt to degrade the high office of a juror into that of a mob, and to inflame the minds of the jury against one particular individual because crimes with which he had no connection had been frequently perpetrated in the community.

But this case was afterwards distinguished by the supreme court of Indiana in *Combs v. State*, 75 Ind. 215, which was also a trial on an indictment for murder. In that case the plea of insanity had been interposed, and the attorney stated that three or four men had been recently executed at Indianapolis, most of whom set up the plea of insanity; and it was held that was not of sufficient materiality to warrant a verdict, that the conduct of the argument was a matter largely within the discretion of the trial court, and that it was only where there was an abuse of such discretion that appellate courts would interfere; and it was there said:

"Courts ought not to reverse causes because counsel, in the heat of argument, sometimes make extravagant statements, or wander a little way outside of the record. If a matter of great materiality is brought into the record as a matter of extended comment, then there would be reason for setting aside the verdict. If every immaterial assertion or statement which creeps into an argument were to be held ground for reversal, courts would be so much occupied in criticising the addresses of advocates as to have little time for anything else. Common fairness requires that courts should ascribe to jurors ordinary intelligence, and not disregard their verdicts because counsel, during the argument, may have made some general statements not supported by evidence."

This court, in *Sears v. Seattle, etc., Street Ry. Co.*, 6 Wash. 227 (33 Pac. 389, 1081), where the counsel had made a statement which was admittedly in conflict with the facts, or, rather, where there had been no testimony to warrant the statement, although he claimed that the statement was a logical inference from the facts proven, said:

"But counsel must be allowed some latitude in the discussion of their cases before the jury, and if they are not permitted to draw inferences or conclusions from the particular facts in evidence it would be impossible for

them to make an argument at all. The mere recital of facts already before the jury is not an argument. There must be some reason offered for the purpose of convincing the mind, some inference drawn from facts established or claimed to exist, in order to constitute an argument. But counsel cannot be compelled by the court to reason logically or to draw correct inferences from given facts; and if they err in these respects it is no ground for a new trial;" citing many cases.

But, in addition to the authorities, which almost universally hold misstatements by counsel will not work a reversal of a judgment unless it clearly appears that the statement was prejudicial, we are satisfied from an investigation of the record that the statement of the counsel was warranted by the testimony of the plaintiff.

An objection is made to the first instruction given by the court, and, without setting forth the instruction *in extenso*, the court, after telling the jury that if they found that the plaintiff had acted as a person of ordinary prudence generally would act under the circumstances, and that no act of his contributed to the injury complained of, said:

"And if you further believe from a preponderance of the evidence that in making and maintaining this road at the place in question, including the steam pipes thereunder, if such there were, defendant, the city of Ballard, failed to exercise such care to know the condition of this road to make and keep said road at said place reasonably and ordinarily safe for ordinary modes of travel, as cities like Ballard, through officers of ordinary care and prudence generally exercise under circumstances entirely similar to all those which surrounded the establishment and maintenance of this Fremont-Ballard road at the place in question; and if you further believe from the preponderance of the evidence that such failure on the part of the city of Ballard, if such failure there was, was the proximate cause, that is, the direct and natural cause of plaintiff's injury,

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if plaintiff was injured, then you will bring in a verdict for plaintiff," etc.

The objection to this instruction is that it endeavors to define the degree of care to be exercised by cities like Ballard in effect as being ordinary care, while the law requires municipalities to exercise only reasonable care and does not impose upon them the duty of ordinary care in maintaining and keeping their streets and sidewalks in safe condition. We are of the opinion that the distinction undertaken to be drawn between ordinary care and reasonable care is not recognized by the authorities, but that they are, in substance, convertible terms; and the cases cited by appellant upon this proposition do not sustain it, for in the first case cited, *Boulder v. Niles*, 9 Colo. 415 (12 Pac. 632), while it was held that it must be shown that the city had not used reasonable diligence in removing certain obstructions from the street, it nowhere appears in the opinion of the court that the term "reasonable diligence" is used as contradistinguished from "ordinary care." But, as showing that it was used in the same sense, the court concludes its observation on this proposition:

"If, in point of fact, the proper officers of the defendant city did not know of such obstruction when, by ordinary and due diligence and care, they ought to have known of it and removed it, the defendant must be held responsible as in case of actual notice."

Dillon on Municipal Corporations (4th ed.), §§ 1006-1019, is also cited by the appellant on this proposition, but we think this authority also shows, if it shows anything at all, that there is no distinction made between these terms. All the cases, of course, hold that the corporation is not required to so construct streets or walks as to secure absolute immunity from danger to people who travel upon them; and this is the question which is generally discussed

in the cases cited. The language used by Mr. Dillon in § 1006, above cited, is as follows:

"Its duty, generally stated, is only to use due and proper care to see that its sidewalks are reasonably safe for persons exercising ordinary care and prudence."

It is true that in *Prindle v. Town of Fletcher*, 39 Vt. 255, the court said:

"We have never understood that, under our statute, the duty of the town, in the matter of keeping its highways in good and sufficient repair, as affecting its liability to pay damages for an injury caused by a defect in such highways, is to be measured by the exercise of ordinary care and diligence;"

basing this announcement largely upon the statute; for, continuing, the court said:

"We think no such test and measure are warranted by the statute, or countenanced by judicial decision. . . . The requirement is, that the town shall keep its highways in good and sufficient repair. This prescribes its duty. If the town is chargeable with any fault in respect to this duty, then the liability attaches."

But even under the statute the language was used unadvisedly by the court, for, proceeding, it says:

"It was not the design of the statute to require impossibilities of the town, and to make it the absolute insurer against all accidents and injuries caused by defects in highways. But it was designed to hold the town to insure against accidents and injuries caused by defects existing through any fault of the town."

It is not difficult to determine that the exercise of ordinary care on the part of the city would relieve it from the duties of an absolute insurer against all accidents and injuries caused by defects in highways, and that decision is based upon the particular circumstances of that case, viz., that the ground gave way under the horse through some

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latent defect under the ground, which was not known and was not discoverable. The court, in its opinion, says that the plaintiff admitted that the authorities of the town could not have learned about it, and that to hold the town liable in such case would establish a principle that would render the town liable as absolute insurer against the consequences of all defects. So that the case, while using the language we have quoted, is not really an authority for appellant's contention.

But in consonance with the view which we have always entertained, that "reasonable care" and "ordinary care" are synonymous terms, we cite *Read v. Morse*, 34 Wis. 315, where the court, in discussing this proposition, says:

"Yet the *degree* of care required is the same. In either case reasonable care, or what is the same thing, ordinary care, only, is required. The term 'reasonable care' has no fixed, definite signification, but is a relative term. The caution which persons of ordinary prudence would exercise in any given case is 'reasonable care,' as the term is used in the law."

In 16 Am. & Eng. Enc. Law, p. 398, it is said:

"It is difficult to define the term 'ordinary care;' it is a relative term, always dependent on relationship and circumstances."

And in a note on the same page it is said:

"Ordinary care depends on circumstances and is such care as a person of ordinary prudence would have exercised;"

citing authorities. So that it would be ordinary care if it was the care which was exercised by reasonable people under ordinary circumstances. We think the distinction, if any at all exists, is too vague to warrant a reversal of the cause on that ground.

Other errors are alleged, but they all hinge more or less

upon the propositions already discussed. An examination of the testimony in the case and of the instructions given and refused convinces us that no error was committed in the trial of the cause.

The judgment will therefore be affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 8449. Decided March 9, 1901.]

OLIVE J. STEARNS, *Respondent*, v. FERDINAND HOCHBRUNN, *Appellant*.

BROKERS — LIABILITY TO PRINCIPAL — ACTION FOR CONVERSION — SUFFICIENCY OF COMPLAINT.

In an action against a real estate broker to recover the difference between the price for which he sold his principal's property and the price which he accounted for, the complaint states a cause of action when it alleges that the plaintiff employed defendant to procure a purchaser for her property at the highest price obtainable; that defendant found a purchaser who was willing to pay a certain sum; that he reported to plaintiff that the purchaser would pay a smaller sum; that a conveyance was made to such purchaser and defendant collected and converted to his own use the difference between the price actually received and that reported by him to plaintiff.

SAME — LIMITATION OF ACTIONS — FRAUD.

An action by a principal against an agent to recover a sum of money, with interest, which the agent had obtained in violation of his trust, had concealed the fact from his principal, refused to pay the money over on demand after discovery, and fraudulently converted it to his own use, is an action for relief on the ground of fraud within the meaning of the statute of limitations, so that an action would not be deemed as having accrued until the discovery by the aggrieved party of the facts constituting the fraud.

SAME — DISCOVERY OF FRAUD — SUFFICIENCY OF ALLEGATIONS TO AVOID STATUTE OF LIMITATIONS.

In an action for relief on the ground of fraud, it is not necessary, in order to avoid the statute of limitations, to allege in the complaint what acts of diligence plaintiff used to discover the

24	206
26	98
24	206
27	399
24	206
28	308
24	206
30	625
24	206
32	356
24	206
436	634
436	637

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Argument of Counsel.

fraud, the circumstances of its discovery, and why it was not discovered sooner, but it is sufficient, under the code, to plead merely the time at which the fraud was discovered.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

John E. Humphries, William E. Humphrey, Harrison Bostwick and Edward Von Tobel, for appellant:

If the cause of action were one for relief on the ground of fraud, then the complaint is not sufficient for want of allegations to bring it within the statute of limitations. No facts are alleged showing that appellant in any way concealed the cause of action. The rule of law in such cases, without exception, is as follows: "If the plaintiff attempts to take the case out of the operation of this statute, he should set up facts which, if proven, would effectually accomplish that purpose; in other words, he should state in what the fraudulent concealment consisted." *Cottrell v. Tenney*, 48 Fed. 716; *Duxbury v. Boice*, 72 N. W. 838; *Wood v. Carpenter*, 101 U. S. 139 (25 L. ed. 807); *Parker v. Kuhn*, 21 Neb. 413; *Higgins v. Crouse*, 42 N. E. 6. "A general allegation of ignorance at one time and of knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner." *Wood v. Carpenter, supra*; *Wood*, Limitations, § 274; *Sankey v. McElevey*, 104 Pa. St. 265 (49 Am. Rep. 575); *Little v. Reynolds*, 28 S. E. 919; *Buswell*, Limitations, § 387, note; *Garrett v. Conklin*, 52 Mo. App. 654; *Miller v. Powers*, 21 N. E. 455 (4 L. R. A. 483); *Barton v. Dickens*, 48 Pa. St. 518; *Young v. Cook*, 30 Miss. 320; *Campbell v. Roe*, 49 N. W. 452; *Douglas v. Corry*, 21 N. E. 440 (15 Am. St. Rep. 604); *Erickson v. Quinn*, 3 Lans. 299; *Kellogg v. Smith*, 26 N. Y. 24;

Lemster v. Warner, 36 N. E. 900; *Swift v. Smith*, 79 Fed. 709; *Chamberlain v. Chicago, B. & Q. Ry. Co.*, 27 Fed. 181; *Schultz v. Board of Commissioners*, 95 Ind. 323; *Churchman v. Indianapolis*, 110 Ind. 259; *Seaman v. Whitney*, 24 Wend. 260 (35 Am. Dec. 618); *Peck v. Bank of America*, 7 L. R. A. 826.

Preston, Carr & Gilman and *E. S. Pillsbury*, for respondent:

The case of *Wood v. Carpenter*, 101 U. S. 139 (25 L. ed. 807), is today an authority only upon the proposition that, where no fiduciary relation exists and the fraud is effected or concealed by mere silence, as distinguished from active misrepresentation, it is necessary to allege due diligence and method of discovery. *Felix v. Patrick*, 145 U. S. 317 (36 L. ed. 719); *Bailey v. Glover*, 21 Wall. 342 (22 L. ed. 636); *Rosenthal v. Walker*, 111 U. S. 185 (28 L. ed. 395); *Traer v. Clews*, 115 U. S. 528 (29 L. ed. 467); *Bates v. Preble*, 151 U. S. 149 (38 L. ed. 106).

The existence of a fiduciary relation excuses the averment or proof of the exercise of diligence to unearth the fraud. *Buckner v. Calcote*, 28 Miss. 432; *Vigus v. O'Bannon*, 8 N. E. 778; *Perry v. Smith*, 2 Pac. 784; *Perry v. Wade*, 2 Pac. 787; *Voss v. Bachop*, 5 Kan. 60; *Kane v. Cook*, 8 Cal. 449; *Atlantic National Bank v. Harris*, 118 Mass. 147; *Harrisburg Bank v. Forster*, 8 Watts, 12; *Way v. Cutting*, 20 N. H. 187.

The opinion of the court was delivered by

FULLERTON, J.—The respondent, who was plaintiff below, brought this action against the appellant to recover the sum of nine thousand dollars, with interest, which she avers the defendant fraudulently converted to his own use. In her complaint the respondent alleges that during the year 1889 she was the owner of certain real property sit-

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uate in the city of Seattle, and that she employed the appellant, who was a real estate broker doing business in that city, to procure a purchaser of the property for the highest price obtainable, agreeing to pay him a certain per centum of the selling price as a commission when he should find such a purchaser; that on or about the 20th day of October, 1889, the defendant procured a purchaser for the premises, who was ready and willing to purchase the same at the price of fifty-five thousand dollars in cash; that thereafter, and prior to the 2d day of November, 1889, the respondent reported to the appellant that he had procured a purchaser for the premises who was willing to pay therefor the sum of forty-six thousand dollars; that she accepted the purchaser at the price so reported to her, and on or about the 2d day of November, 1889, executed and delivered a deed to the premises to the purchaser, and that the purchaser forthwith paid to the respondent for the appellant therefor the sum of fifty-five thousand dollars; of which the defendant paid the respondent only the sum of forty-six thousand dollars; that she afterwards paid the appellant the commission agreed upon for his services as her broker. The 7th and 8th allegations of the complaint were as follows:

“That the defendant at all times fraudulently concealed from the plaintiff the fact that the said purchaser was willing to pay for said property the sum of fifty-five thousand dollars, and did in fact pay said sum; and the plaintiff was and has been since at all times ignorant of the fact of said concealment, and of the conversion by the defendant of the sum of nine thousand dollars hereinafter stated, until the 7th day of July, 1898, on which date the plaintiff first learned thereof.”

“That the defendant has never paid to plaintiff the said sum of nine thousand dollars, or any part thereof, though demand has this day been made therefor by the plaintiff;

but the defendant has fraudulently, and in disregard of his duty in that behalf, converted the said sum of nine thousand dollars to his own use."

Then follows a demand for judgment against the appellant for the sum of nine thousand dollars, with interest thereon at the legal rate from the 2d day of November, 1889. The appellant demurred to the complaint on the grounds: (1) That the same did not state facts sufficient to constitute a cause of action; and (2) that said action was not commenced within the time limited by law. The demurrer was overruled, whereupon the defendant answered, denying the fraud alleged in the complaint, and setting out his version of the transaction. In substance, he alleged that he first sold the property to one Dahl for forty-six thousand dollars, and accepted two hundred dollars earnest money from him; that he then met Feurer, the person to whom the deed to the property was afterwards made, and learned that he could sell the property to him at an advance; that he then made an arrangement with Dahl to sell the property to Feurer at an advance of ten thousand dollars, provided he could get respondent to make a direct conveyance to Feurer; that he informed the appellant that the purchaser of said property was desirous of selling the same to Feurer, and procured her to make a deed of said property to him; that afterwards Feurer paid to the original purchaser the sum of fifty-six thousand dollars, and the original purchaser paid to the appellant the sum of forty-six thousand dollars, whereupon the deed was delivered to Feurer; that he received for his services only the commission paid him by the appellant, and a commission of two thousand dollars paid him by Dahl for reselling the property. For a second defense, he alleged that the cause of action set forth in the complaint did not accrue within three years prior to the bringing of the

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same, and that the respondent was fully aware of the resale of the property at the time the deed was made, and of all the facts connected therewith, "so far as the same concerned her," and that the cause of action was barred by the statute of limitations. The plaintiff replied, denying the new matter alleged in the answers, and on the issues thus made a trial was had, resulting in a verdict and judgment for the respondent.

The first error assigned is, that the court erred in overruling the demurrer to the complaint. As against the first ground of demurrer, the complaint is clearly sufficient. Under our statute a demurrer on this ground does not raise the question of the bar of the statute of limitations, and the sufficiency of the complaint must be determined from the facts alleged, without regard to the time intervening between the transaction and the commencement of the action. A broker employed to procure a purchaser for the real property of another must, like all other agents, exercise good faith toward his principal. He is not permitted to speculate with the subject-matter of his agency for his own advantage. If he sells for one price and reports a less price, or if he is authorized to sell at a certain price and sells for a higher price than that authorized, he must account to his principal for the difference. Here it is alleged that the appellant was employed to procure a purchaser for the respondent's property at the highest price obtainable; that he found a purchaser who was willing to pay a certain sum; that he reported to his principal that the purchaser would pay only a much less sum; and collected and converted to his own use the difference. Clearly, he must account to his principal for it.

In support of the second ground of demurrer the appellant first contends that the action is not one which the Code denominates "An action for relief on the ground of

fraud." He argues that the complaint, if it states a cause of action at all, states a cause of action for money had and received; that the fraud charged is merely for the purpose of excusing delay in the commencement of the action, and is not the substantive ground upon which relief is sought; and hence the action is not saved by that section of the statute which provides that in an action for relief on the ground of fraud the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. But we think the appellant has misconceived the effect of the allegations of the complaint. The nature of a cause of action must be determined from a consideration of the facts alleged, and not from the name the pleader may have used to characterize such facts. *Andrews v. King County*, 1 Wash. 47 (23 Pac. 409, 22 Am. St. Rep. 136). The fraud of the appellant is the very gravamen of the charge against him. In effect, the allegation is that the appellant, in violation of his trust, obtained a large sum of money which rightfully belonged to the respondent, concealed the fact from her, refused to pay it over on demand after discovery, and fraudulently converted it to his own use. While the demand of the complaint is for a judgment in a sum of money equal to the amount converted, with interest, it is none the less an action for relief on the ground of fraud, within the meaning of the statute. *Lataillade v. Orena*, 91 Cal. 573 (27 Pac. 924, 25 Am. St. Rep. 219).

It is next urged that the complaint is fatally defective in that it fails to allege what acts of diligence the respondent used to discover the fraud, the circumstances of its discovery, and why it was not discovered sooner. It must be admitted that this contention finds support in the decisions of courts of states having statutes similar to, if not in the exact language of, our own. Without citing the cases,

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or referring to them more specifically, the mistake made by these courts is, we think, in applying the rules of construction of pleadings pertaining to the old equity practice to pleadings under the Code. While it is true that the foundation principle of courts of equity in granting relief on the ground of fraud was that the party defrauded was not affected by the lapse of time so long as he remained in ignorance of the fraud that had been committed, yet equity aided the diligent and not the negligent, and the conduct of the party defrauded, in determining his right to relief, was as important as the conduct of the party perpetrating the fraud. The courts therefore held that the plaintiff, in order to put a defendant on his defense, must negative the presumption of negligence which arose from the mere lapse of time. In accordance with this principle, and the principle that means of discovery is actual discovery, the earliest English statute relating to relief on the ground of fraud applicable to suits in equity (that of 3 and 4, Wm. IV.) enacted that "The cause of action is deemed to have accrued at, and not before, the time at which such fraud shall, *or with reasonable diligence might, have been* first known or discovered." By our Code, all forms of pleading are abolished; the complaint is sufficient when it contains a plain and concise statement of the facts constituting the cause of action; and the rules by which the sufficiency of a pleading is to be determined are those prescribed therein. The statute, too, it will be noticed, omits the italicized portion of the English statute above quoted. It would seem from this that the statute intended that a complaint should be deemed sufficient when it contained a direct and positive statement of the time of the discovery of the fraud, without further negating the idea that the fraud might have been discovered sooner; leaving it rather a rule of evidence than a rule of pleading, if it

still be the rule that means of discovery is equivalent to actual discovery.

That it is not necessary to plead more than the time at which the fraud was discovered to avoid the statute of limitations was ruled in *Zieverink v. Kemper*, 50 Ohio St. 208 (34 N. E. 250). There, as here, it was contended that the complaint was fatally defective because the circumstances under which the alleged fraud was discovered were not stated in the complaint. Passing on this objection, the court observed:

“Whatever may have been necessary when the chancellor refused to give relief against wrongs of long standing, unless the plaintiff disclosed in his bill, due diligence in not only ascertaining his rights, but also in discovering the fraud of his adversary, and when, therefore, the conduct of the plaintiff was as important as that of the defendant in determining plaintiff’s right to relief, we think no such rule of pleading obtains under our Code of Civil Procedure. . . .

“We think the case of *Combs v. Watson*, 32 Ohio St. 228, states the true rule, and that all that is necessary, in such case, is to state that the fraud was not discovered until within four years before the action was brought; and that it is not necessary, as against a demurrer, to state the exact date at which the fraud was discovered, nor what acts of diligence plaintiff used to discover the fraud, nor what acts of concealment the defendant practiced to prevent a discovery of the fraud. The conclusion here arrived at is sustained by the decisions of other states having Codes similar to ours.”

In *Kansas Pacific Ry. Co. v. McCormick*, 20 Kan. 107, in an opinion by Mr. Justice BREWER, the rule is stated as follows:

“It is insisted by counsel that under the old equity practice the circumstances under which the fraud was discovered, had to be stated, and that the same rule obtains today. (See as to the equity practice, *Carr v. Hilton*, 1 Cur-

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tis Ct. Ct. 390; *Moore v. Greene*, 2 Curtis Ct. Ct. 205). Whatever may have been necessary when the chancellor refused to give relief against wrongs of long standing, unless the plaintiff disclosed due diligence in ascertaining his rights and discovering the fraud, and when therefore the conduct of the plaintiff was as important as that of the defendant in determining the right to present relief, we think no such rule obtains under our present practice. The statute aims to settle the question of limitation, and it is not left to the discretion of the chancellor. The action may be brought at any time within two years after discovery of the fraud. It may not be brought thereafter. The question is, *When* did the plaintiff discover the wrong? and not, *Was* he diligent in its investigation? The question is one of time, and not of conduct. The statute requires in a petition a concise statement of the facts constituting the cause of action; but the manner in which the fraud has been discovered is no part of or element in such cause of action. The cause of action is in the wrong done; and even the time of discovery is a matter affecting solely the statute of limitations, and that statute has regard to the time, and not to the manner of discovery."

See, also, *Ryan v. Leavenworth, A. & N. W. Ry. Co.* 21 Kan. 365, 404. As we have said, there are cases which maintain the contrary doctrine. We prefer, however, to follow the cases cited, as being more in consonance with the rules of pleading prescribed by the Code than those which adhere to the rules of the courts of equity.

Other errors are assigned going to the sufficiency of the evidence to sustain the verdict, and the instructions of the court to the jury. After a careful examination of the record on which they are based, we do not find them of sufficient merit to warrant a reversal of the case, or to justify the extended statement necessary to be made in order to clearly present the questions involved.

The judgment is affirmed.

REAVIS, C. J., and DUNBAR and ANDERS, JJ., concur.

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30	628

24	216
41	82

[No. 3498. Decided March 9, 1901.]

CORDELIA I. KINKEAD, *Appellant*, v. HOLMES & BULL FURNITURE COMPANY, *Respondent*.

CONVERSION — LIMITATION OF ACTIONS.

Where one rightfully in the possession of another's goods wrongfully pledged them to a third party, who afterwards sold them in satisfaction of the pledge, the limitation upon the owner's right of action against the pledgee for conversion began to run from the time of the pledgee's acquisition of the goods and not from the time of sale.

SAME — PLEADING STATUTE OF LIMITATIONS — SUFFICIENCY OF ANSWER.

An answer, in an action for conversion of plaintiff's goods, which alleges that "For further and affirmative answer to said complaint, defendant says that more than three years elapsed between the accruing and commencement of plaintiff's alleged cause of action," while defective as a plea of the statute of limitations, is yet sufficient to put the plaintiff on notice that the statute would be relied on as a defense, and, where not moved against in the lower court by demurrer or motion, will on appeal be considered as amended, under Bal. Code, §§ 4957, 6535, since no substantial right of the plaintiff was affected by its defectiveness.

Appeal from Superior Court, Pierce County.—Hon. THOMAS CARROLL, Judge. Affirmed.

Walter M. Harvey, for appellant:

The affirmative answer of the respondent does not state facts sufficient to constitute a defense to appellant's complaint, and is not in law a good plea of the statute of limitation. *Gammon v. Dyke*, 2 Wash. T. 266; *Eno v. Diefendorf*, 102 N. Y. 720 (7 N. E. 798); *Paine v. Comstock*, 14 N. W. 910; *Plumer v. Clarke*, 18 N. W. 467; *Smith v. Dregert*, 18 N. W. 732.

Where a *bona fide* purchaser, pledgee, or mortgagee has received the property from one who has every indication of

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ownership by reason of his possession of the property, he is not held in law to be guilty of the conversion of it until he does some act which would show a conversion of the property, after notice of the true owner's rights, or, as is frequently the case, a demand has been made by the true owner and he refuses to surrender the property. *Hovey v. Bromley*, 33 N. Y. Supp. 400; *Plano Mfg. Co. v. Northern Pacific Elevator Co.*, 51 Minn. 167 (53 N. W. 202); *Valentine v. Duff*, 34 N. E. 453; *Stephens v. Meriden Britannia Co.*, 43 N. Y. Supp. 226; *Metcalf v. Dickman*, 43 Ill. App. 284; *Parker v. Middlebrook*, 24 Conn. 207; *Barrett v. Warren*, 3 Hill, 348; *Tallman v. Turck*, 26 Barb. 167; *Wood v. Cohen*, 6 Ind. 455 (63 Am. Dec. 389).

B. S. Grosscup and *F. S. Blattner*, for respondent.

The opinion of the court was delivered by

FULLERTON, J.—This is an action in damages brought by the appellant against the respondent for the conversion of certain personal property, consisting of household goods. The complaint, with certain immaterial exceptions, was in the usual form. The answer was a general denial and a plea, by way of further and separate answer, of the statute of limitations. On the trial, at the conclusion of the testimony of the appellant the respondent moved for judgment against the appellant, which motion the court sustained on the ground that the action had not been commenced within the time limited by law. The facts appearing at that time were substantially these: The appellant in June, 1891, brought certain household furniture from San Francisco to Tacoma and went to housekeeping in Tacoma with her married daughter and son-in-law, one W. A. Clarke. About the middle of September following she returned to San Francisco, leaving her household goods in the possession

of Clarke and wife. Shortly thereafter Clarke mortgaged these goods, with certain of his own, to Holmes & Osgood to secure a debt which he owed to that firm. In October, 1891, Clarke broke up housekeeping, and pledged the property to the respondent to secure his indebtedness to it, delivering the property into its possession; Clarke at the time agreeing to pay the Holmes & Osgood mortgage, which he afterwards did. In August, 1893, the respondent sold the property and applied the proceeds of the sale towards the satisfaction of the debt which it was pledged to secure. It appears from the testimony of the appellant that she first learned that the property had been pledged to the respondent by Clarke between "February and June, 1892," and that she immediately wrote to it, notifying it of her ownership of the property. No demand was made on the respondent for the return of the property prior to the commencement of the action. The action was commenced on the 16th day of November, 1895.

The material question presented by the record is, when did the cause of action accrue? It is the contention of the learned counsel for the appellant that the cause of action accrued at the time the property was sold, in August, 1893. He argues that, inasmuch as the respondent came into the possession of the property without notice of the claim of the appellant, the appellant could not maintain an action against it for a wrongful conversion until demand was made for the possession of the property, or until the respondent, after it had received notice of the appellant's claim, did some act with relation to the property inconsistent with the rights of the appellant; hence, as the evidence fails to show a demand, but does show that the respondent had notice of the appellant's ownership prior to the sale of the property, the cause of action accrued at and not before the time the property was sold and the respondent

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applied the proceeds thereof to its own use. The fallacy of the reasoning of counsel, we think, lies in the assumption that demand, or some further act of conversion other than the original taking, was necessary in order that an action could be maintained by the appellant against the respondent for the recovery of the property or for its wrongful conversion. The rule is the other way. The mere act of receiving in pledge property from one who has no right to dispose of it is a conversion as against the true owner, for which such owner may maintain an action without demanding the return of the property, or without the pledgee doing any other act indicating an intent to appropriate it to his own use.

"Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion." Cooley, Torts (2d ed.), 448; *Fernald v. Chase*, 37 Me. 290.

"A possession taken under a purchase from one without title, and who has himself been guilty of a conversion in disposing of the goods or chattels, is a possession unauthorized and wrongful at its inception, and which the absence of evil intent in the purchaser cannot make rightful or lawful. Such a possession is based on the assumption of a right of property, or a right of dominion over it, derived from the contract of sale; and what is this, in the legal sense, but a wrongful intermeddling or asportation or detention of the property of another? At common law, a conversion is that tort which is committed by a person who deals with chattels not belonging to him, in a manner which is inconsistent with the rights of the lawful owner." LORD, C. J., in *Velsian v. Lewis*, 15 Ore. 539 (16 Pac 631, 3 Am. St. Rep. 184).

The precise question here presented has been determined adversely to the appellant's contention by the supreme court of California. In a case where the defendants had in good faith, and without notice of plaintiff's rights, re-

ceived in pledge the plaintiff's goods from her bailee, and afterwards sold them, it was held that the statute of limitations commenced to run from the time the defendant acquired possession, and not from the time of the subsequent sale of the goods by them. *Harpending v. Meyer*, 55 Cal. 555. The trial court, therefore, did not err in concluding that appellant's right of action accrued more than three years prior to the commencement of the action.

It is insisted that there is no sufficient plea of the statute of limitations, and that for this reason the trial court erred in holding the action barred by that statute. The language of the answer in this respect is as follows: "For further and affirmative answer to said complaint, defendant says that more than three years elapsed between the accruing and commencement of plaintiff's alleged cause of action." The appellant took issue on this part of the answer in the court below by general denial, and, so far as the record discloses, the question of its sufficiency or insufficiency as a plea was not brought to the attention of the trial court, but is raised here for the first time. It may be conceded that the plea is defective and subject to demurrer, but we cannot agree with the contention of counsel that it is so radically defective as to be no plea at all. It was sufficient to put the appellant upon notice that the statute of limitations would be relied upon as one of the defenses to the cause of action stated in her complaint, and was therefore but a defective statement of a good defense, and not a statement of no defense at all. It was likewise capable of amendment. *Morgan v. Morgan*, 10 Wash. 103 (38 Pac. 1054). And, had the appellant raised the objection in the court below, the respondent would have been entitled to amend as of course. As no substantial right of the appellant was affected by this defect, it is insufficient to require a reversal of the cause by this court. Ballin-

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Syllabus.

ger's Code, §§ 4957, 6535; *Allend v. Spokane Falls & N. Ry. Co.*, 21 Wash. 324 (58 Pac. 244).

The judgment is affirmed.

REAVIS, C. J., and DUNBAR and ANDERS, JJ., concur.

[No. 3679. Decided March 9, 1901.]

SAMUEL H. SLOAN, *Respondent*, v. NORTH AMERICAN
TRANSPORTATION & TRADING COMPANY, *Appellant*.

CARRIERS — FAILURE TO CARRY PASSENGERS TO DESTINATION — ACTION
FOR DAMAGES — NEW TRIAL — VERDICT CONTRARY TO INSTRUCTIONS.

In an action against a carrier for damages for failure to transport plaintiff to a destination contracted for, the refusal of the court to grant a new trial on the ground that the verdict in plaintiff's favor was contrary to the instruction of the court, was not error, where the court charged that it was plaintiff's duty, in case of the inability of the carrier to transport him, either to finish the journey himself or return to the point of embarkation, if either was reasonably practicable, and that he could not recover for loss of time or sickness if he remained unnecessarily at the point where the carrier left him, since the question of whether it was reasonably practicable for plaintiff to return to the point of embarkation or continue to the point of destination was submitted to the jury and by their verdict they found that it was not practicable for him to do either.

SAME — INSTRUCTIONS.

Where a transportation company agreed to carry plaintiff to Dawson City by way of the Yukon river, and failed to perform its contract, but, after its failure to carry him further than Fort Yukon, the captain of the steamer represented that he would take him down the river seventy miles, where there was a cabin suitable for occupancy and a good place to cut wood for the winter; and plaintiff was put ashore at that point on condition that he would cut wood for the defendant, and there contracted a cold and severe sickness, permanently impairing his health, by reason of the fact that the cabin was not in a habitable condition, it was not error for the court in an action by him for damages to refuse to charge that plaintiff's

sickness was not, under the testimony in the case, such a result of any failure of the defendant to carry him to Dawson as would entitle him to reimbursement, since it was for the jury, and not the court, to say whether, under the testimony, the plaintiff's sickness was the result of defendant's failure to carry him to Dawson.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

Bausman, Kelleher & Emory, for appellant.

Upton, Arthur & Wheeler, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—Respondent purchased of appellant a ticket entitling him to transportation by boat from Seattle to Dawson City by way of St. Michaels and the Yukon river, and became a passenger, by reason of such ticket, on defendant's steamship Cleveland, bound for St. Michaels, where he arrived August 18, 1897. Here he was detained until the 31st of August, and was then placed upon appellant's river boat the John J. Healy, upon which he arrived at Fort Yukon on the 14th of September. The appellant company concluding that it could not proceed to Dawson, the respondent was put ashore; the company furnishing him with certain provisions, for which he was to pay the next year. There is no question but that the appellant failed, if it did not refuse, to provide respondent with transportation from Fort Yukon to Dawson City. The master of the Healy represented to respondent and his father, who was accompanying him, that he would take them to a good place to cut wood, where there was a cabin suitable for occupancy, about seventy miles down the Yukon river. On condition that they would cut wood for the appellant, they were taken to this place and put ashore, and the appellant's boat left them at that place. Accord-

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ing to the testimony of the respondent, the cabin had been partly burned down and was not in a habitable condition. The respondent, who was then a healthy man, was compelled to sleep on the frozen ground for three nights, and contracted a cold and sickness, which continued through the winter and permanently broke down his health, and was the cause of the damages for which he seeks to recover against the appellant.

The appeal involves simply questions of fact. There are two assignments of error, the first of which is that the court erred in not granting a new trial on the ground that the verdict was contrary to the following instruction of the court:

“Upon the defendant company’s failure or refusal to carry Mr. Sloan further than Fort Yukon, if it did so fail or refuse, it became the duty of Sloan, then and there, to return to Seattle, or to finish the journey to Dawson himself, if either was reasonably practicable; and if you should find that it was reasonably practicable for him to do one or both of these things, and that he did neither, but voluntarily remained between these places, then he can recover neither for loss of time nor sickness incurred while remaining there, if he so remained unnecessarily. The plaintiff cannot recover more in this case than such sum as you shall find that it would have necessarily cost him to complete the journey to Dawson by the steamboat Bella from the place where he left the steamer Healy, provided he could by a reasonable effort on his part have so completed the journey.”

The second assignment is that the court erred in refusing to give the following instruction which was asked by the appellant:

“I instruct you, gentlemen, that plaintiff Sloan’s sickness, if any you shall find, is not, under the testimony in this case, such a result of any failure of the defendant company to carry him to Dawson as entitles him to

reimbursement. Such sickness, then, you are not to consider.”

The question of whether it was reasonably practicable for the respondent to return to Seattle or to finish the journey to Dawson was submitted to the jury, and was decided in favor of the respondent's contention that it was not practicable for him to do either. The same may be said in relation to the instruction asked for by the appellant. It was for the jury, and not the court, to say whether, under the testimony in the case, the respondent's sickness was the result of the failure of the defendant company to carry him to Dawson. The argument made by counsel for appellant in its brief, and the deductions drawn from the testimony in the case, would have been an appropriate argument to have addressed to the jury, but are not pertinent here. If the respondent was compelled by the company to enter into this wood-chopping business where he did, or if he was induced by misrepresentations of the company to stop at the place where he contracted the cold which caused his sickness, his claim against the company is a good one; and this question was submitted to the jury under proper instructions, and the finding was in favor of the respondent. We have examined the record in this cause, and believe from the testimony that the jury was justified in arriving at the conclusion which it did. The testimony was competent and legally sufficient, and the affirmative ascertainment of these two propositions precludes further inquiry by the appellate tribunal.

The judgment is affirmed.

REAVIS, C. J., and ANDERS, J., concur.

FULLERTON, J., dissents.

Mar. 1901.] Opinion of the Court—DUNBAR, J.

[No. 3767. Decided March 9. 1901.]

LIZZIE NEWMAN, *Respondent*, v. EVA BUZARD *et vir*, *Appellants*.

PLEADING — AMENDMENT OF COMPLAINT ON TRIAL.

In an action to quiet title in which the defendants had set up the defense that the taxes on the land in controversy had been paid by them, it was not an abuse of discretion for the court to permit the plaintiff on the trial to amend her complaint by interlineation so as to show payment of taxes for certain years by her grantor.

EVIDENCE — OBJECTION TO ADMISSION — TIMELINESS.

The refusal of the court to strike the testimony of a witness, on the ground that it related to transactions with a deceased person and that the witness was disqualified under Bal. Code, § 5991, as being a party in interest, was not error, where the testimony was admitted without objection, the witness subjected to a rigid cross-examination on the matters involved, but no examination made as to his alleged interest and no opportunity afforded him for explanation, and the motion to strike his testimony was not interposed until some days following its admission.

PAROL — ADMISSIBLE TO IDENTIFY DESCRIPTION IN DEED.

Under the rule that parol evidence is admissible to identify the property described in and conveyed by a deed, in order to ascertain to what property the particulars of description in the deed apply, it is permissible to prove by parol that a tract of land described in a deed as "lot 6" was intended to include an unnumbered fractional lot adjoining.

Appeal from Superior Court, King County.—Hon. WILLIAM HICKMAN MOORE, Judge. Affirmed.

Lyman E. Knapp, for appellants.

Smith & Cole, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—In December, 1872, Henry L. Yesler was the owner of the premises in controversy and platted the land into Terry's Second Addition to the Town of Seattle.

In this plat was a block, numbered 42, of fractional area. The north half of said block consisted of lots 2, 3 and 6 and a triangular piece of land adjoining Yesler way, formerly Mill street, which triangular piece of land is the subject of this controversy. In May, 1887, Yesler gave Everett Smith a bond for a deed of the north half of said block. This bond described the property as lots 2, 3, 6, and fractional lot 7, in block 42. At this time the streets had not been graded and the property was covered with brush and stumps. Yesler took Smith on to this land and pointed out the boundaries of the lots sold, which included all of the east half of the block. Smith immediately cleared the east half of the block, including the tract in controversy, of all its brush and stumps. In June, 1887, Smith paid Yesler the amount of the bond purchase price and received a warranty deed of conveyance. The description in the deed was "lots 2, 3 and 6 of block 42." The reason for variation between bond for deed and deed was that when the abstract of title was procured by Smith the true description of the property was found to be as inserted in the deed. It seems that there were two plats of said addition, and on the one which the conveyancer followed was a certificate of an abstractor that lot 6 included the fractional lot which is now denominated "fractional lot 7." Immediately upon the execution and delivery of this deed, Smith sold and conveyed lot 6 to S. Newman; taking him upon the ground and pointing out its boundaries, which were clearly defined by the clearing made. The property shown by Smith to Newman, as in the case of Yesler to Smith, included the fractional lot now in controversy. Mr. Newman took possession, and afterwards, in 1897, sold and conveyed the premises by general warranty deed to Lizzie Newman, the respondent. In 1898 the administrators of the estate of Yesler, deceased, offered for sale and sold to

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appellant Buzard a tract described as "all the right, title, and interest of the Estate of Henry L. Yesler in and to fractional lot, not numbered, adjoining on the south lot 6 of block 6 of Terry's Second Addition to the city of Seattle," by which sale it was intended to convey the interest of the Yesler estate to the triangular piece of land in controversy. When such sale became known to respondent, this action was brought by her to quiet title to the said fractional lot; and, upon a trial of the cause, judgment was rendered in favor of plaintiff (respondent here), and a decree entered in accordance with the prayer of the complaint. From such judgment this appeal is prosecuted.

The first assignment of error is that the court abused its discretion in allowing an amendment to the complaint on the trial, by interlineation, alleging that the plaintiff's grantor, S. Newman, paid all the taxes legally assessed against the property from 1887 to 1894, inclusive. It is alleged by the appellant that he was taken by surprise, and should have been allowed time to have investigated and secured copies of the records of assessments. We think this contention was fairly answered by the court, upon the objection made at the time, when it said: "The defendant seems to set up the affirmative here,—the defense that they have paid all the taxes that were ever assessed against the property. They must have known something about the question of taxes, or they wouldn't have made that allegation." In addition to this, the amendment of pleadings is a matter so largely delegated to the discretion of the trial court that, unless there is a plain abuse of such discretion, it will not be interfered with by this court, and in this case we think the action of the court was not conducive to the injury of appellant.

The second allegation is that the court erred in admitting the testimony of Everett Smith relating to Yesler

showing him the ground contracted to be sold, and the refusing to strike the same, for the reason that Yesler is dead and cannot be heard, and Smith is an interested party, within the meaning of the law. It appears that Smith some twelve years before the commencement of the action had given to Newman a deed for this land, with a clause of general warranty; and it is claimed by the appellant that his liability on the warranty constitutes him a party in interest, under § 5991, Bal. Code, which provides that:

“In an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen years, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased or insane person, or by any such minor under the age of fourteen years.”

Without deciding whether the statute was intended to apply to a case of this kind, it is sufficient to say, in the first instance, that the testimony was admitted without objection, that the appellant entered into a rigid cross-examination of the witness on the subject involved, and that it was not until some days after that a motion was made to strike the testimony for the reason alleged. It is stated by the appellant, in an affidavit which appears in the record, that the reason he did not object was that he was taken by surprise, and that the testimony was given so rapidly that he did not think to object. But the appellant must have been notified of the interest that Smith had, if any, in the result of this suit, for the complaint discloses it, by alleging that the title of the respondent

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came through Smith by warranty deed. In addition to this, there was no showing made at the trial of the interest that Smith may have had. He was not examined as to his interest. If he had been, he might have had some explanation to make of the seeming interest that he had by reason of his warranty. This opportunity was not given. The question was not raised timely, and the court committed no error in refusing to strike the testimony.

The same may be said in relation to the third assignment,—that the court erred in the admission of testimony by witnesses Lowman and Everett Smith relating to what was intended to be conveyed by the deed by said Yesler to said Smith, and also in refusing to strike said testimony. It is insisted that parol evidence is not admissible to vary or explain the description of a deed where there is no ambiguity, and cases are cited by appellants to sustain this proposition. The correctness of this rule will not be disputed, and it is evident that there is no ambiguity in this deed itself. But the rule is different where the ambiguity arises outside of the deed. In such instance, parol evidence is admissible to explain it. Said Mr. Greenleaf, in vol. 1, § 277, of his work on Evidence:

“The duty of the court in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of the words they have used. It is merely a duty of interpretation; that is, to find out the true sense of the written words, as the parties used them; and of construction, that is, when the true sense is ascertained, to subject the instrument, in its operation, to the established rules of law.”

And in § 282 it is said:

“To ascertain the meaning of these words, it is obvious that parol evidence of extraneous facts and circumstances may in some cases be admitted to a very great ex-

tent, without in any wise infringing the spirit of the rule under consideration."

It seems to us that this is a case which falls within the announcement just quoted, where parol testimony should be admitted, not to show that it was not the intention of the grantor and grantee to convey lot 6, but that by the use of the words "lot 6," which they employed in the written instrument, the intention was to convey the triangular piece of land adjoining lot 6, and which it was supposed was embraced in the description "lot 6." Parol evidence is, and must of necessity be always, admissible to identify the property described in and conveyed by a deed, to ascertain to what property the particulars of description in the deed apply. *Ames v. Lowry*, 30 Minn. 283 (15 N. W. 247).

See, also, *Hicklin v. McClear*, 18 Ore. 126 (22 Pac. 1057); *Sengfelder v. Hill*, 21 Wash 371 (58 Pac. 250).

No prejudicial error was committed by the admission of the abstract of title.

In answer to the fifth assignment, that the evidence adduced at the trial did not justify the findings of fact, we will say, without specially reviewing the testimony, that an examination of the statement of facts convinces us that the findings were justified. The equities in this case seem to be with the respondent, and the judgment is affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

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Opinion of the Court—ANDERS, J.

[No. 3105. Decided March 11, 1901.]

N. H. LATIMER, *Appellant*, v. CHARLES H. BLACK, *Respondent*.

24	231
25	112
24	231
34	335
24	231
42	9

NEW TRIAL — ABUSE OF DISCRETION.

The action of the trial court in granting a new trial cannot be considered as an abuse of discretion, when there was a substantial conflict in the testimony, and there is nothing in the record disclosing that the new trial was granted because of a misconception of the law applicable to the case.

Appeal from Superior Court, King County.—Hon. ORANGE JACOBS, Judge. Affirmed.

Blaine & De Vries and *Stratton & Powell*, for appellant.

Ira Bronson, for respondent.

The opinion of the court was delivered by

ANDERS, J.—In this case it appears that respondent, Black, had in his possession, as collateral to secure the payment of a certain note for \$600, warrants aggregating \$845.15, purporting to have been issued by Chehalis county. The note for which the warrants were held as collateral was made by one Jameson to F. W. Baker, and by Baker indorsed and sold to respondent, Black. When the note was sold the collateral was transferred. The warrants were subsequently sold to N. H. Latimer, the note held by Black satisfied, and the residue paid to Jameson; a commission (divided between Baker and one Goodfellow) being reserved from the payment made to Jameson. Upon discovery that the warrants were forgeries, Latimer demanded re-payment from Black, and brought this action to recover the full amount of the purchase money, alleging that Black had, as principal, sold him the warrants

in question. Issue was joined on plaintiff's allegations, and a trial was had May 9 and 10, 1898. The jury found for plaintiff, Latimer, in the full amount of his demands, \$845.15, and the defendant moved for new trial on all statutory grounds. The court granted the motion conditionally, the preliminary order being as follows:

"Defendant's motion for a new trial granted unless plaintiff consent to accept in lieu of the amount assessed by the jury the sum of \$600 and interest, and remit all above said amount."

Plaintiff refused to remit, and final order was entered as follows:

"This cause having come on regularly for trial on the 9th day of May, 1898, plaintiff being present in court, in person and by his counsel, and the defendant being also present in court and by his counsel, and the jury being empaneled to try the cause, and said jury having heard the evidence offered on behalf of the plaintiff and defendant, respectively, and having heard the argument of counsel, and the instructions of the court, retired to consider their verdict, and thereafter returned their verdict into the court against the defendant, Charles H. Black, and in favor of the plaintiff, N. H. Latimer, for the sum of eight hundred and forty-five and 15-100 dollars, with interest from the 20th day of December, 1895. Thereafter defendant duly served and filed his motion for a new trial herein, which came on for hearing before this court on the 21st day of May, 1898, and was by the court taken under advisement; and thereafter on the 11th day of July, 1898, it was ordered by the court that said motion for a new trial be granted unless the plaintiff consent to accept in lieu of the amount assessed by the jury in their said verdict the sum of \$600 with interest thereon at legal rate from the 20th day of December, 1895, and remit all of said verdict above said amount.

"The plaintiff now in open court having refused to remit any portion of said verdict, or to accept in lieu of the

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amounts so assessed by the jury the sum of \$600 and interest as aforesaid, it is considered and adjudged by the court that the said motion of the defendant for a new trial herein be, and the same is hereby, granted, and that the said verdict be, and the same is hereby, set aside and vacated, and that a new trial herein be had."

From this order the plaintiff has appealed.

The doctrine that the discretion of the lower court in granting a new trial will not be reviewed except in case of abuse is too well settled in this state to be disturbed, even if it were desirable to change the rule. *Holgate v. Parker*, 18 Wash. 206 (51 Pac. 368); *McBroom & Wilson Co. v. Gandy*, 18 Wash. 79 (50 Pac. 572), and cases therein cited.

It is equally well settled that, if the record discloses a substantial conflict in the testimony, this court will not declare an abuse of discretion. *Rotting v. Cleman*, 12 Wash. 615 (41 Pac. 907), cited and approved in *McBroom & Wilson Co. v. Gandy*, *supra*.

It is urged by the learned counsel for appellant that the above recited order of the lower court takes this case out of the rule, for the alleged reason that it appears upon its face that the court proceeded upon the assumption that the appellant could not legally recover from the respondent more than the amount which the latter actually received from the proceeds of the warrants, viz., \$600, together with interest thereon at the legal rate; and it is insisted that the court's view of the law was erroneous, and that a new trial was therefore granted solely upon a misconception of the law applicable to the case. We are unable to agree with this contention. As matter of fact, it clearly appears from the record that the court instructed the jury to the effect that, if they found for the plaintiff (appellant), their verdict should be for the whole amount

paid by him for the warrants, with legal interest thereon from the date of purchase. The instructions given to the jury were submitted by counsel for appellant, and, of course, were in accordance with their views of the law of the case; and authorities are cited which seem to support the rule laid down by the court in its instructions to the jury. From what we have said, it is apparent that the court below entertained at the trial no uncertain opinion as to the amount, if any, recoverable by appellant; and we find nothing in the record warranting the conclusion that it changed its opinion in that regard at the hearing of the motion for a new trial.

It may be admitted that, when the lower court gives a legal conclusion as a reason for allowing a new trial, this court will review the reason and conclusion so given, but this is not such a case; and this court will not assume that the lower court entered the order above set out from pure reasons of law, unless the record so discloses. In other words we will not infer from the court's order, in view of the whole record, that its action was taken upon legal considerations, and not because of dissatisfaction with the finding of the jury on the facts. For aught that appears in the record, the trial court may have been of opinion that the testimony, as introduced, did not justify a verdict in a sum greater than \$600. The record shows that there is a substantial conflict in the testimony. Beyond this we do not inquire, for we have nothing to do with the merits of the case at this time.

It appearing that there has been no abuse of the discretion of the lower court, the judgment is affirmed.

REAVIS, C. J., and DUNBAR, J., concur.

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Opinion of the Court—DUNBAR, J.

[No. 3469. Decided March 11, 1901.]

JOHN MEGRATH, *Appellant*, v. F. O. NICKERSON *et al.*,
County Commissioners for King County, Respondents.

24	286
83	521
24	235
37	123

HIGHWAYS — PRESCRIPTIVE RIGHT — INTERRUPTION OF USE BY PUBLIC.

A title by prescription to a highway did not inure to the benefit of the public from the fact that the public had been permitted for a number of years to travel a road across private premises, and that that portion of the road had been worked by the county during the absence of the owner, when there were distinct acts on the part of the owner, prior to the maturing of a prescriptive right, indicating an intention not to dedicate a highway, such as maintaining gates across the road, and posting notices thereon that it was private property, and demanding that the gates be kept shut.

SAME — LAYING OUT — VALIDITY.

The fact that viewers appointed by the county commissioners to survey a road in pursuance of a petition therefor continue the survey beyond the limits set by the petition would give no authority to the county to establish a road beyond the point named in the petition.

Appeal from Superior Court, King County.—Hon. WILLIAM HICKMAN MOORE, Judge. Reversed.

Preston, Carr & Gilman, for appellant.

James F. McElroy, John B. Hart and Walter S. Fulton, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—This action was brought by the appellant, as owner of certain lands in King county, against the county commissioners of said county, to restrain them from establishing and using as a highway a strip of

land crossing said premises. In 1873 a petition was filed with the county commissioners of King county, praying that a road be opened from Alki Point to a point at or near Parmerlee's house, on the west side of the Duwamish river, in King county. Parmerlee's house is three or four miles south of said Alki Point. The commissioners ordered a survey, and the viewers, after reaching the point described in the petition, continued the survey a mile or two further south across the land of the appellant, and continued until they were stopped by another settler, who would not permit them to cross his land. The survey was then abandoned, and a report made and filed with the county commissioners. The board of county commissioners approved the survey of the road from Alki Point to the Parmerlee house. No reference was made to the continuation of the survey. There was a ferry on the Duwamish river just north of the Parmerlee house, and it would have been desirable to connect the road which was laid out with said ferry, thus securing connection with the public road lying on the east side of the Duwamish river and connecting with the ferry. There were settlers to the south of the south terminus of the road as described in the petition, and south of said ferry, on the west bank of the Duwamish river. McAllister, appellant's vendor, was one of these, and his north line was about 200 yards south of the Parmerlee house, the terminus of the road, according to the petition. The settlers in this neighborhood had cleared a way along the bank of the river, which they used in their communication with each other from as early a date as 1873, but there is no testimony that it was anything more than a trail or a foot path. In course of time, however, it was traveled by wheeled vehicles, and the different settlers fenced their lands and put in gates across this way,

and from that time, viz., about 1890, public work was performed on portions of this road, and it was passable for wagons and teams. But no work was ever done on the land in question prior to the purchase of the same by the appellant, who purchased the land in 1888. This work was done by the county in 1892, when the appellant was absent and the premises were vacated, and there is no testimony that he had any information that the work was being done. In fact he testifies positively to the contrary. The work consisted in placing some six or eight loads of gravel upon the road which crossed his land. No other work was done on this road or attempted until April, 1895. Shortly after this attempt by the county to work upon the road, this action was commenced to restrain the county from doing so. Upon the trial of the cause it was found by the court that by action of the county commissioners the road became a public highway, duly surveyed, laid out, opened and established, upon, over, and across the lands mentioned in the complaint, and it was also found that for more than seven years prior to the 6th day of March, 1890, and ever since, it has been continuously and uninterruptedly used, traveled, and worked and kept up at the expense of the public, as a county road and public highway, within said King county. As a conclusion of law, the court found that the road was a public highway, and that the officers of the county were entitled to enter upon, occupy, and work the same without any interference or hindrance from the plaintiff, and dissolved the temporary injunction which had theretofore been issued, and gave judgment against the plaintiff for costs.

Many cases are cited by both appellant and respondents in favor of their respective contentions in this case, although there does not seem to be so much contention about

what the law is as what are the facts which were elicited at the trial. The law governing prescriptive rights of the public in roads and highways was announced by this court in the case of *Shell v. Poulson*, 23 Wash. 535 (63 Pac. 204), in an opinion filed on the 14th of December, 1900. The authorities were investigated and the announcement made, in substance, that, to establish a highway by prescription there must be an actual public use, general, uninterrupted and continuous, under claim of right, for the term of years necessary to establish the right; and we cited *Shellhouse v. State*, 110 Ind. 509 (11 N. E. 484), where it is said:

“When the use is interrupted, prescription is annihilated and must begin again, A highway, from its very nature, must be open to the public for use day and night, and any unambiguous act by the owner, such as erecting gates or bars over the highway, which evinces his intention to exclude the public from the uninterrupted use of the highway, destroys the prescriptive right, unless it had fully matured before it was interrupted.”

Also, it was determined by the court in that case, to the effect that, before a highway could be established by prescription, the general public, under a claim of right, and not by mere permission of the owner, must have used some defined way, without interruption or substantial change, for twenty years or more; and that a gate erected across the way and maintained for, and kept closed at certain stated times during, a period of four years by the owner, evincing an intention to exclude the public from the uninterrupted use thereof, destroys any prescriptive right not already fully accrued. We think it is not necessary in this case to go again into an investigation of the authorities. This line of authorities, however, is not controverted by the respondents, but it is claimed that they have no application to the case at bar. This case dif-

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fers from the *Shell Case*, *supra*, in this: that there was more work done by the public on this road than there was on the one under discussion in that case. But the essential distinction claimed is that the gates, which were maintained, were maintained for the purpose of keeping the stock of the settlers from roaming off from the premises of their owners by getting onto the public highway. It is true that some of the settlers who maintained gates stated that that was their object in placing the gates across the road, but this appellant could not be bound by any intention which actuated his neighbors. It is insisted, however, that John W. McAllister, who was a son of appellant's grantor, and who lived with his father on the premises, testified that that was the grantor's object in erecting and maintaining the gates. This is not strictly according to the record. In answer to the question, "Do you know the reason why they were placed there?" (referring to the gates), witness said, "Well, I think they were put there to keep everybody's cattle on their property, and for the accommodation of the people who had to go through." And he testifies in exactly the same words on cross-examination. So that, according to that testimony, they were placed there for the accommodation of the people who had to go through, and not alone for the purpose of keeping cattle on the property of their owners.

But, conceding the testimony to be as claimed by the respondents, under the statute of limitations in relation to real estate, as it then existed, the prescriptive right could not have accrued at the time the land was purchased by Megrath, although, as we indicated before, we do not think that there is any substantial testimony showing that the road was traveled as a public highway at so early a date. But, from the time Megrath became the

owner and possessor of the land, he certainly indicated to the public no intention to dedicate the road to public use, or to allow a prescriptive right to mature. The gravel was placed upon his road in his absence. He was not called upon to haul it away, nor was he called upon to exercise constant watchfulness lest the county should make a claim to a portion of his land. When he discovered that there was some intention on the part of the county to do so, he made known, by affirmative action, that he claimed the land, by placing notices upon the gates to the effect that it was private property, and demanding that the gates be shut. So we do not think, without specially reviewing the testimony, that it can be deduced from the evidence that the user was uninterrupted and continuous for a sufficient length of time, under any claimed theory of limitation, to establish a prescriptive right in favor of the public. It was not a free and untrammelled use, but was a use which was interrupted by unambiguous acts of ownership. Neither does the testimony show that the use was adverse. On the contrary, it does show that it was permissive and subordinate to private ownership.

So far as the question of establishment of the road by the county commissioners is concerned, we are clearly of the opinion that no legal road was established across appellant's premises. It is the petition which gives the county commissioners jurisdiction to act in the premises. They have no authority to call the road into existence by their own mandate. The law prescribes the manner in which matters of this kind are brought to their attention and submitted to their jurisdiction, and that is by a petition signed by the requisite number of qualified petitioners, intelligently describing the location of the road

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Syllabus.

petitioned for; and any act of the commissioners not based on such petition would be void.

Neither can the claim of the county be aided in this case by the act approved March 6, 1890 (Laws 1889-90, p. 733), entitled, "An act correcting informalities of record in the establishment of various public roads and highways in this state," for the reason that it is not shown by the testimony that this road had been worked and kept up at the expense of the public for a term of seven years prior to the 6th day of March, 1890, or for the term of seven years subsequent to that date.

The judgment is reversed and remanded, with instructions to proceed in accordance with this opinion.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3621. Decided March 11, 1901.]

JOEL GREEN *et al.*, Appellants, v. L. A. MOORE, Defendant, WESTERN ASSURANCE COMPANY *et al.*, Respondents.

24	241
30	114

APPEALABLE ORDER — DENIAL OF MOTION FOR JUDGMENT IN GARNISHMENT PROCEEDINGS.

The action of the court in denying plaintiff's motion for judgment against garnishee defendants, based upon their answer in the garnishment proceedings, is not such a final determination of the proceeding as to constitute an appealable order, within the contemplation of title 36, Ballinger's Code.

Appeal from Superior Court, Spokane County—Hon. LEANDER H. PRATHER, Judge. Appeal dismissed.

Crow & Williams, for appellants.

Graves & Graves and *Winston & Winston*, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—Appellants recovered judgment against defendant Moore, and in proceedings supplemental to execution, the court ordered the judgment debtor Moore to appear for examination touching her property, enjoining her from making any transfer of her property pending such proceedings. Thereafter, all of the parties being before the court, an order of continuance was made, by which it was directed that the injunction order should be continued in full force until the final determination of said proceedings. The proceedings have never been determined and the injunction is now in force. Subsequently appellants filed in the superior court an affidavit for garnishment against the respondents, claiming that they held property of, and were indebted to, the judgment debtor Moore. Respondents appeared and filed separate answers, in which they alleged that they had issued certain policies of insurance on a building owned by the judgment debtor, which building had been destroyed by fire; that each garnishee defendant had issued a policy on said building for \$2,500, and by the terms of the policies the loss, if any, was payable to the Holland Bank, mortgagee, as its interest might appear. In addition, each of said answers contained this allegation, to-wit:

“That on December 2, A. D. 1899, the said L. A. Moore advised this garnishee defendant that she had executed her assignment in writing in favor of A. S. Upton of all interest in and to said policy.”

After the filing of the answer, and a certain stipulation which it is not material to recite, appellants moved for judgment against the insurance companies for the remainder of the said insurance money, after paying the Holland Bank, less also such amount as might be allowed respondents by way of attorneys' fees and costs. This

motion was made under § 5402, Bal. Code, and upon hearing the motion was denied by the court, and, on the court's motion, an order was made directing respondents to bring into the action A. S. Upson, who was mentioned in said answers. From the order of the court denying the motion, this appeal is taken.

It is said by the appellants that the paragraph of the answer reciting that L. A. Moore had advised the garnishee that she had executed her assignment in writing in favor of A. S. Upson of all interest in and to said policy, raises the only question important to consider on this appeal. A motion has, however, been introduced by the respondents to dismiss this appeal on the ground that the order appealed from is not an appealable order. We think the motion must be sustained. Without specially reviewing all of the provisions of title 36, Bal. Code, in relation to appeals to the supreme court, we are convinced that this is not such a final determination as is contemplated by the provisions of that chapter. The case is still pending in the superior court and, upon the trial of the cause, the sufficiency of the answer objected to will no doubt be determined. Conceding, without deciding, that the answer of the garnishees is not sufficient, yet a motion for judgment was not the proper practice. The petitioner cannot by reason of a defective pleading move for judgment. He must pursue his remedy against the pleading by demurrer or motion. The law provides, and this court has often decided, that, upon the final determination of a cause on appeal, all errors which were made during the pendency of the action will be reviewed, and the cause will not be tried piecemeal by entertaining appeals from the different errors which may be alleged to have been committed by the court during the trial of the cause.

The order not being appealable, the appeal will be dismissed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3686. Decided March 11, 1901.]

M. C. SANDERS, *Respondent*, v. JOHN BARTELT *et ux*,
Appellants.

APPEAL — REVIEW IN EQUITY CASES — DECISION BASED ON WRONG GROUNDS.

Although the judgment of the lower court in an equity case may have been based upon a proposition of law which cannot be sustained, yet, where all the testimony is before the appellate court for inspection, the judgment will not be reversed, if it can be sustained upon any legal principle.

Appeal from the Superior Court, Spokane County.—
HON. WILLIAM E. RICHARDSON, Judge. Affirmed.

Crow & Williams, for appellants.

John C. Kleber and David Herman, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is an action to foreclose a lien for labor which the respondent claims to have performed on the property of the appellants. The only question arising is whether respondent was to receive \$3 or \$2.50 per day for his work. The time respondent worked was twenty-four days and six hours. Briefly stated, one Rube Reynolds, who was a foreman of Bartelt, one of the appellants here, by authority of Bartelt, employed the respondent to work on Bartelt's building. He contracted with the respondent to pay him \$3 per day, but the appellants claim that Reynolds had authority only to em-

Mar. 1901.] Opinion of the Court—DUNBAR, J.

ploy the respondent at \$2.50 per day. The court found in favor of the respondent, allowing him wages at \$3 per day, and entered judgment accordingly.

It is insisted by the appellants that the court erred in allowing witnesses, over their objection, to testify that it was the custom and usage of the foreman upon a building to fix the wages of employees, and in allowing testimony as to the reasonable value of wages. Cases are cited to the effect that one who makes a contract with one who acts as a special attorney is bound, at his peril, to ascertain the authority of such attorney and its existence; while it is contended by the respondent, and many authorities are cited to sustain his contention, that appellants having constituted Reynolds their attorney to hire respondent, and having placed him over the work as foreman, any secret instructions or limitations put upon his power as such could not affect respondent, who had no notice thereof; that he had a right to assume that he had authority to pay him the regular going wages; that this was within the agent's apparent authority, and that the respondent was not required to make inquiry as to the agent's powers or restrictions in such case. But, without entering into a discussion of these legal propositions, this court has frequently decided, in harmony with universal authority, that in an equity case where all the testimony is here for our inspection, even though the lower court may render a judgment based upon a proposition of law which cannot be sustained, if the judgment is right and can be sustained upon any legal principle, it will not be reversed. In this case, should it be found that the respondent was bound to take knowledge of the restrictions placed upon the agent of the appellants, and that the agent had no authority to enter into the contract that he did with respondent, then there was no contract existing

between the respondent and appellants, and the respondent had a right to recover upon a *quantum meruit*; for it would certainly be inequitable to hold the laborer to his contract of hire, and yet not allow him to recover upon the terms of the contract.

The judgment is right, and will be affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3692. Decided March 11, 1901.]

HUGH HENRY, *Respondent*, v. GRANT STREET ELECTRIC RAILWAY COMPANY, *Appellant*.

STREET RAILROADS — NEGLIGENCE — STOPPING CAR FOR PASSENGER TO ALIGHT AT DANGEROUS PLACE.

A street railway company is guilty of negligence, when the conductor on one of the cars, having been informed by a passenger that he desired to get off at a certain point, calls out the destination and rings the bell for the motorman to stop, but the car is allowed to run some fifty feet beyond the landing, stopping on a trestle where it is dangerous to alight, and the passenger is put off at that point and informed that his destination is "Right across there."

SAME — CONTRIBUTORY NEGLIGENCE.

A passenger upon a street car is not guilty of contributory negligence in alighting therefrom in a dangerous place, though he was familiar with the surroundings, where the night was dark, and he had indicated to the conductor to stop at the proper landing place on a trestle upon which the track was laid above the tide flats, but the car had been allowed to run fifty feet beyond the landing, and the conductor, after calling out the name of the destination desired by the passenger, put him off in the unusual and dangerous place at which the car had stopped, and the passenger, in reliance upon the conductor's having put him off at the regular stopping place, did not take the precaution to observe the position he was in, and, on taking a step away from the car, was precipitated some twelve or thirteen feet from the trestle upon the tide flats below.

Mar. 1901.] Opinion of the Court—DUNBAR, J.

INSTRUCTIONS — RELEVANCY TO ISSUES.

In an action to recover for personal injuries received by reason of alighting from a street car at a dangerous place, after having been carried beyond the proper landing place, without notification from the defendant's employees, it is not error to refuse a requested instruction by defendant as to the degree of care required of a carrier of passengers in maintaining its platforms and landings in a safe condition.

SAME — CONSTRUCTION AS A WHOLE — HARMLESS ERROR.

Although a portion of an instruction, if standing alone, might have a tendency to confuse the jury, yet it will not constitute prejudicial error, if, when taken in connection with the instruction as a whole, the jury could not be misled as to the presentation by the court of the law of the case.

Appeal from Superior Court, King County.—Hon. FRANK T. REID, Judge. Affirmed.

Stratton & Powell, for appellant.

Sachs & Hale, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—On the night of the accident in question, respondent, Henry, became a passenger on one of the appellant's cars at the corner of Yesler and South Second streets in the city of Seattle, to be carried to the power house at the intersection of Charles street and Grant street. The respondent notified the conductor of the car that he desired to be put off at the power house; the proper landing being on Charles street where the respondent was accustomed to be put off for the purpose of repairing to the power house. As the car was nearing Charles street, the conductor called out "Charles street," and the respondent notified him that he wished to get off. The conductor then went out on the rear platform, and gave the bell for the motorman to stop the car. The car, however, did not stop on Charles street where there is a plank roadway thirty-five or forty feet wide, guarded by railings on all

sides, but, according to the testimony of the respondent, went about fifty feet beyond, where there is no protection for passengers alighting, where the track passes over a trestle some twelve or thirteen feet above the tide flats. The conductor had been informed that the respondent desired to go to the power house, and when the car stopped, and the respondent got off, the conductor, pointing east, remarked "Right across," or "Right across there," and the respondent, believing that the car was at the usual place of stopping, stepped from the car, striking his foot on the bull rail or scantling some twenty-two or three inches, according to the testimony, from the step of the car, and was precipitated to the ground through an unprotected space between the track and the wagon road, a distance of some twelve or thirteen feet, sustaining the injuries complained of. Upon the trial of the cause judgment was rendered in favor of the respondent for \$4,000.

Several errors are alleged by the appellant, but from the manner in which they are presented it is difficult to follow them in course. There are two propositions, however, which control this case: (1) Was the appellant guilty of negligence in passing the street where it was accustomed to discharge its passengers, and discharging plaintiff in the dangerous place which the evidence shows this was? and (2) Was the respondent guilty of contributory negligence in not noting, under the circumstances, the dangers surrounding the place on which he alighted, and by caution protecting himself against such dangers? We think both of these questions must be answered in favor of respondent's contention, viz., that the company was guilty of negligence and that the respondent was not guilty of contributory negligence. The respondent testified that he thought he was at the place where he was accustomed to get off the car on Charles street, and started right out for the power house, and that the first step he took he

stumbled and fell; that the reason that he did not take any precautions was because he assumed that the conductor had put him off where he requested to be put off,—at the regular stopping place. It is said by the appellant that his taking the wrong course was due entirely to his own carelessness,—in the first place, that it was careless for him to assume that it was Charles street; that, being familiar with the premises, he knew that the track turned there (it being shown by the testimony that the track turned rather abruptly just after leaving Charles street); that, if he had been using ordinary care for his own safety, in view of his knowledge of the situation of the premises, he could not but have known that he had passed out of Charles street. We do not think the law calls upon a passenger to watch the course of a car, or to notice in what direction it is going. He has a right to rely upon the conductor's putting him off where he directs him to. It would simply be impracticable for passengers on a street car to rely upon their own observations, especially upon a dark night,—which it was shown this was. The cases of *Forsyth v. Boston & A. R. R. Co.*, 103 Mass. 510; *Gulf, C. & S. F. Ry. Co. v. Hodges*, 24 S. W. 563; *St. Louis, I. M. & S. Ry. v. Cox*, 60 Ark. 106 (29 S. W. 38); *Bradley v. Grand Trunk Ry. Co.*, 107 Mich. 243 (65 N. W. 102); and *Gulf, C. & S. F. Ry. Co. v. Jordan*, 33 S. W. 690,—are cited by the appellant to sustain the contention that the respondent was guilty of contributory negligence under the circumstances of this case. We have examined these cases, but they entirely fail to meet appellant's contention. *Forsyth v. Boston & A. R. R. Co.*, *supra*, was where a passenger alighted from the cars upon a platform having a step at the end next the highway, and, instead of walking along the platform, he voluntarily stepped from it, with the intention of going obliquely across the track to the highway, and, when he stepped off,

fell into a cattle guard dug across the track, and was injured. It will be seen at once that this case is not in point. Common prudence calls upon passengers to seek the steps leading from the platforms because common observation shows that almost all railroad platforms are raised more or less above the level of the track. In this instance, however, there was no course for the respondent to pursue but the one he did pursue, granting that he had a right to assume that he had been put off on Charles street. *Gulf, C. & S. F. Ry. Co. v. Hodges, supra*, is the same kind of a case, where plaintiff alighted from a train, and stepped off a platform, where it was dark, and walked off a place where it was between four and five feet high. He testified that he was paying no attention to his way whatever, and the court said that it seemed to them that for a man seventy-six years old to proceed along a railroad platform in the dark in the manner testified to by the plaintiff in that case necessarily conveyed the idea of negligence. The other cases cited, without specially distinguishing them, come no nearer fitting the facts in this case than the ones we have reviewed. Neither have we been able to find any cases, and do not believe they exist, that hold that the plaintiff, under such circumstances as are portrayed by the testimony in this case, was guilty of contributory negligence.

We think it is too plain to need argument that defendant was guilty of negligence in carrying the passenger by his destination, and landing him at a point fraught with so much danger as the one in question was. No authorities are cited on this proposition, and we think none can be found that will excuse the company for this transgression of duty.

The appellant asked the following instruction, and alleges error in the refusal of the court to grant it:

"The court instructs you, gentlemen of the jury, that the defendant in this case is a common carrier of passengers for hire; that the law does not require the same degree of care on the part of a common carrier in maintaining in safe condition the platforms and landings upon which its passengers alight as it does in the actual transportation of passengers. In the transportation of passengers the carrier must exercise the highest degree of care possible under the circumstances for the safety of its passengers, but the law requires that the common carrier shall exercise only such degree of care as an ordinarily prudent person would, under the circumstances, in maintaining in safe condition its platforms and landings at which its passengers alight."

A few cases are cited to sustain this proposition of law, but they have no application to the case at bar, and the question involved in this instruction asked for was not involved in the case tried. There is no pretense here that the car stopped at a platform of any kind, and there is no question of the perfection or imperfection of the landing place or platform of the car, such as is discussed in the cases cited. It is not claimed that the car in this case landed on a platform at all. It is conceded, and must be conceded by the testimony of both the plaintiff and the defendant, that it was a dangerous place to land a passenger; and the only question in the case was whether there was sufficient notification of the danger by the respondent to put him upon his guard. No error was committed by refusing the instruction.

It is insisted that the court erred in giving instruction set out in the assignment of error No. 8, where the court instructed the jury that, if they believed the plaintiff had made out a *prima facie* case, it was their duty to give him a verdict, unless the defendant established its affirmative defense by a preponderance of the evidence. While this seems to be rather awkward phraseology, and, if taken

alone, it might confuse the jury, and constitute error, an examination of the whole instruction—which is too long to reproduce here—shows that the court was simply trying to instruct the jury that contributory negligence on the part of the respondent was an affirmative defense. We think, from the whole instruction, that the jury were not misled, and that no prejudicial error was committed. The instructions are very long, somewhat involved, and full of repetition, but, as a whole, we think the law was fairly and rightly presented to the jury, and that the instructions asked for by the appellant either had been given in substance by the court in its direct charge, or did not state the law.

No prejudicial error was committed in the rejection or admission of testimony. The questions of fact were submitted to the jury, and were found against the appellant. The judgment is affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3511. Decided March 12, 1901.]

ELVIRA C. TYLER *et vir*, *Respondents*, v. NORTH AMERICAN TRANSPORTATION & TRADING COMPANY, *Appellant*.

NEW TRIAL — NEWLY DISCOVERED EVIDENCE — DISCRETION OF COURT.

The denial of a new trial to defendant on the ground of newly discovered evidence does not constitute an abuse of discretion, when the newly discovered evidence consisted of statements made by plaintiff's husband differing from her own testimony, given in a deposition by him, which was taken on notice, and published during the trial without the knowledge of defendant, when the court gives full effect to any inferences deducible from the deposition in overruling the motion for new trial on condition that plaintiffs remit a portion of their verdict.

Mar. 1901.] Opinion of the Court—REAVIS, C. J.

PLEADING — EXHIBITS — STRIKING OUT.

The refusal of the court to strike from a complaint an exhibit containing a statement of items of damage demanded from defendant, which named a sum in excess of the amount demanded in the complaint, was not prejudicial, when the court fully advised the jury of the limit of damages claimed and what was before them for investigation.

Appeal from Superior Court, King County.—Hon. ORANGE JACOBS, Judge. Affirmed.

Bausman, Kelleher & Emory, for appellant.

Upton, Arthur & Wheeler, for respondents.

The opinion of the court was delivered by

REAVIS, C. J.—Action for damages on breach of contract of carriage of plaintiff Elvira C. Tyler from Seattle to Dawson City, by way of St. Michaels and the Yukon river, in 1897. The damages alleged were injured health and sickness, and expenses incident thereto, as well as expenses attending the delay in failure to transport plaintiff according to contract. There are but two errors assigned: (1) The court erred in refusing to grant a new trial on the ground of newly discovered testimony; (2) the court erred in denying defendant's motion to strike from the complaint the exhibit annexed thereto, and in denying the motion at the close of the argument that the exhibit be stricken from the pleading or that the pleading be withheld from the jury.

Relative to the first assignment, it appears that the deposition of the plaintiff George Tyler was taken upon interrogatories propounded by the plaintiffs, and upon notice to the defendant, at Dawson, and that the deposition was filed with the clerk of the trial court during the progress of the trial, and about the time the plaintiff Elvira C. Tyler was testifying; that the testimony at the time of the filing of the deposition was not concluded; that

the deposition was published and counsel for plaintiffs informed that it was filed; that counsel for defendant did not know when it was filed, although they had inquired from time to time previously to its reception to ascertain if it were filed. The respective counsel filed affidavits upon the motion for a new trial, stating the facts substantially as mentioned. Counsel for defendant maintain that the deposition was material, in that it contradicted the testimony of the plaintiff who testified. An examination of the deposition shows, however, some variations in the statements between the plaintiff who testified and the deponent as to the extent of some of the items of damage. The superior court overruled the motion for a new trial upon condition that the plaintiffs remit several hundred dollars in the amount of the verdict; that is, reduced it from \$1,999 to \$1,332. Apparently the court in its reduction gave full effect to any inferences deduced from the deposition which was not before the jury. It is evident that counsel for each party at the trial were anticipating this deposition. Of course, there was notice of its taking, and either counsel could have been advised of its contents. It cannot be said the superior court abused its discretion in refusal of the order for a new trial.

The exhibit complained of was attached to the complaint, and was a statement of the items of damage which were demanded from defendant, and amounted to a large sum,—something over \$7,000. The amount demanded in the complaint was less. We cannot perceive that the court's ruling upon the exhibit remaining attached to the complaint is reversible error. The instructions of the court fully advised the jury of the limit of the damages claimed and what was before them for investigation.

The assignments of error failing, the judgment is affirmed.

DUNBAR and ANDERS, JJ., concur.

Mar. 1901.]

Opinion Per Curiam.

[No. 3759. Decided March 12, 1901.]

THE STATE OF WASHINGTON, *Respondent*, v. SUSAN HALL,
Appellant.

ARSON — VALIDITY OF STATUTE — PLURAL SUBJECTS EMBRACED IN ONE ACT.

LAWS 1895, p. 173, defining the crimes of arson and attempted arson, and providing a punishment for each, does not violate art. 2, § 19, of the constitution, which provides that "No bill shall embrace more than one subject," since arson and attempted arson are sufficiently connected to permit legislation with reference thereto to be embodied in one act.

JUROR — QUALIFICATIONS — SERVICE ON JURY WITHIN PREVIOUS YEAR.

Bal. Code, § 4748, which makes service upon a jury within the previous year a ground for challenge, does not render one incompetent to serve as a juror, in the absence of a challenge.

NEW TRIAL — DISCRETION OF COURT — FALSE ANSWERS BY JUROR.

The refusal of the court to grant a new trial on the ground that a juror had testified falsely on his *voir dire* as to having formed an opinion of guilt previous to the trial cannot be regarded as an abuse of discretion merely from the fact that two persons make affidavit thereto in opposition to the affidavit of the juror alone.

Appeal from Superior Court, Walla Walla County.—
Hon. THOMAS H. BRENTS, Judge. Affirmed.

T. P. & C. C. Gose, for appellant.

Oscar Cain, Prosecuting Attorney, for the State.

PER CURIAM.—The appellant was informed against by the prosecuting attorney of Walla Walla county for the crime of arson, and upon a trial before the court and a jury a verdict of guilty was returned against her. From the judgment and sentence pronounced upon the verdict, she appeals to this court.

It is assigned that the court erred in defining the crime of arson in his instructions to the jury. This is

based, not upon the instruction itself, but upon the statute; the contention being that the statute defining the crime of arson, from which the instruction was taken, is unconstitutional and void, because in violation of § 19, art. 2, of the state constitution, which provides, "No bill shall embrace more than one subject, and that shall be expressed in the title." The statute in question (Session Laws 1895, p. 173) is entitled, "An act to define and punish the crime of arson and attempted arson, and declaring an emergency;" and the body of the act defines the crime of arson and attempted arson, and provides a punishment for each. It is urged that there is no such connection between the subject-matter of the one and the subject-matter of the other as to permit them to be embodied in one act. But we cannot think the act falls within the rule contended for. The general rule is that if the matters embraced in a statute have congruity, or are naturally connected with each other, or are cognate and germane to each other, the statute does not embrace more than one subject, and in determining these questions the constitution must not be so narrowly construed as to unnecessarily hamper or cripple legislation. It is also a general rule, applicable particularly in construing statutes with reference to their titles, that statutes must be held constitutional unless they are clearly void. Under these general principles, arson and attempted arson are sufficiently connected, we think, to permit legislation with reference thereto to be embodied in one act.

The record discloses that one of the jurors, who was called from the bystanders, when being examined upon his *voir dire* stated that he had no knowledge of the facts of the case, and that he had not served on a jury within the preceding year. A motion for a new trial was filed, in support of which it was shown by affidavits that the juror had in fact been called from the bystanders and

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Opinion Per Curiam.

served as a juror in a civil action tried in the same court some months before, but less than a year preceding the trial. Two affidavits were also filed in which the affiants swore that they were acquainted with the juror, and had a conversation with him in which he made statements tending to show that he had formed an opinion previous to the trial relative to the guilt of the appellant. The affidavits filed further show that neither the appellant nor her attorneys had knowledge of these matters at the time of the trial. In opposition to the motion the prosecutor filed the affidavit of the juror, in which the juror stated that he was not asked, while being examined on his *voir dire*, whether or not he had served on a jury within a year; that he had no acquaintance with, and did not know, either of the persons named in the affidavits who swore to the statements; that he did not make the statements attributed to him, either to them or to any one; and that he had not formed or expressed an opinion as to the guilt or innocence of the appellant prior to hearing the evidence on the trial. The trial court overruled the motion, and error is predicated thereon. It will be noticed that the statute (Ballinger's Code, § 4748) does not make service upon a jury within the previous year a disqualification, but only a ground for challenge; hence it cannot be said that the appellant was tried by a jury any member of which was incompetent by positive statute. It may be conceded that it is a sufficient ground for a new trial to show that one of the jurors had prejudged the case, and had, when questioned as to his opinions on *voir dire*, wilfully given false answers touching his condition of mind, or to show that a juror has given a wilfully false answer to any question proper to be asked him touching his qualifications to sit on the jury, provided the juror is accepted by the party without knowledge that his answers are false. But, before an appellate court will be warranted in overruling

the judgment of the trial court refusing to grant a new trial on this ground, the proofs that wilfully false answers were made by the juror must be clear and convincing,—in fact so much so that the appellate court can say that the trial court abused its discretion in refusing to grant a new trial. The present record does not satisfy these requirements. Because the juror answered that he had not served on a jury during the preceding year, when in fact he had, does not necessarily imply that he was untruthful; nor does it even trend in that direction. Without the showing of anything more than the answer, and the fact that it was erroneous, the conclusion would be that the juror was guilty of a lapse of memory, or of misunderstanding the question asked him, rather than that he was guilty of wilful perjury. On the other question there is a square contradiction in the record. True, there are two witnesses on the one side, and the juror alone on the other. But which side is to be believed depends so much on the character of the persons testifying that we cannot say the trial judge abused his discretion in believing the juror, and not the affiants.

The judgment is affirmed.

[No. 8698. Decided March 13, 1901.]

LAND MORTGAGE BANK OF NORTHWESTERN AMERICA,
LIMITED, *Respondent*, v. JOHN A. NICHOLSON, *Appellant*.

SUBMITTED QUESTIONS — FAILURE OF JURY TO ANSWER — RIGHT OF COURT TO DETERMINE.

The failure of a jury in an equity case to answer a question submitted by the court for their investigation as to the facts will not preclude the court from proceeding, upon the testimony adduced, to make findings of fact and conclusions of law in reference to the subject covered by such question.

Mar. 1901.] Opinion of the Court—DUNBAR, J.

Appeal from Superior Court, Thurston County.—Hon. OLIVER V. LINN, Judge. Affirmed.

H. L. Forrest and Byron Millett, for appellant.

Piles, Donworth & Howe and Allen Weir, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—In August, 1894, Patrick Dunning, George McFry, and Mary Ann McFry executed to the plaintiff their note for \$3,000, with interest at the rate of ten per cent. from date until paid, and to secure the payment of said note executed a mortgage of the west half of section 33, township 19 north, range 1 west, excepting therefrom twenty acres. The description in the mortgage excepting from its lien the twenty acres was as follows: "Beginning 80 rods south of the northwest corner of said section 33; running thence south on section line 80 rods; thence east 40 rods; thence north 80 rods; thence west to the place of beginning." The mortgagors failing to comply with the conditions of the mortgage, an action of foreclosure was instituted, judgment was obtained in said action, and the mortgaged premises, under order of the court, were sold. After the sale of the land it was discovered that a mistake had been made in the description of the twenty acres excepted from the lien; that the description should have been "Beginning at a point on the west line of said section 33, 120 rods south of the northwest corner of said section," instead of "80 rods south," as it appears in the mortgage. As the description appeared in the mortgages, the improvements on the farm fell on one of the ten-acre tracts which were excepted from the mortgage. It is evident that it was the intention to have the description in the mortgage commence at the point 120 rods south of the northwest corner, instead of the 80 rods

south. At the time of the application for the mortgage Dunning pointed out on the face of the earth the location of the excepted lands, which left the ten-acre tract in dispute here within the lien of the mortgage. In his application for the loan he also describes the buildings which were on the ten-acre tract in dispute, and insurance was taken out by the company in Dunning's name, subject to its interest, as is usual in such cases. So that there is no question, under the testimony in this case, but that a mutual mistake was made in describing the excepted property; and upon the discovery of this mistake a motion was made to revoke the order of sale, which was allowed, and the action was brought to reform and foreclose the mortgage, making it to conform to the intention of the parties at the time the mortgage was given. As to the general right of the mortgagors to bring an action of this kind, see *Jenkins v. Jenkins University*, 17 Wash. 160 (49 Pac. 247), where it was held that a mortgage describing by metes and bounds the tract intended to be mortgaged may be reformed when it was the intention of the parties to mortgage a tract upon which certain buildings stood, and by mutual mistake the land was described so as to indicate only a portion of the buildings. After the suit in foreclosure had been commenced, Dunning, who was the owner of the land in question, gave a quitclaim deed of the same to his nephew, John A. Nicholson, the appellant. In this action Dunning and the McFrys defaulted, and Nicholson resists the reformation of the mortgage, claiming that he was an innocent purchaser without notice of the mistake. Certain questions were submitted to a jury, but the pertinent question in the case, viz., whether or not Nicholson knew that the lands in question had really been mortgaged, was not answered by the jury; whereupon, by motion of respondent, the court proceeded, upon the testimony which had been adduced,

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Syllabus.

to make findings of fact and conclusions of law; and we think there can be no question of the right of the court to do this. The court found, in substance, that Nicholson was not an innocent purchaser, and that the mortgage should be reformed as prayed for. Judgment was entered in accordance with this finding, and from this judgment Nicholson appeals.

There are no questions of law involved in this case, or, at least, conceding all the presumptions that are claimed by the appellant, we are satisfied that the findings of the court and its conclusions of law were correct. It would serve no good purpose to undertake an analysis of the testimony in this case. We have examined it carefully, and from such examination are satisfied that Nicholson knew that the mortgage which was given by Dunning and the McFrys was intended to embrace the ten-acre tract of land upon which the buildings and improvements were located. His own testimony convinces us of this fact, outside of the testimony offered by the plaintiff in the case. The judgment is therefore affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3743. Decided March 13, 1901.]

FRANK UREN, *Respondent*, v. GOLDEN TUNNEL MINING COMPANY, *Appellant*.

NEGLIGENCE — EVIDENCE ADMISSIBLE UNDER GENERAL ALLEGATION.

Where the complaint in an action to recover for personal injuries contains a general allegation of negligence, any fact tending to contribute approximately to the injury is admissible in evidence thereunder.

APPEAL — SUFFICIENCY OF EVIDENCE.

The verdict of the jury will not be disturbed upon a disputed question of fact, where the evidence is conflicting.

24	261
28	306
24	261
32	328
24	261
36	349
24	261
440	55
40	286
24	261
42	133

MASTER AND SERVANT — FELLOW-SERVANTS — SEPARATE EMPLOYMENT UNDER COMMON MASTER.

The fact that two men were working for the same mining company would not make them fellow servants, when they were employed in separate tunnels under different superintendents, where no supervision of each other's work was possible and no opportunity afforded to use precautions against each other's negligence.

SAME — ASSUMPTION OF RISKS.

The rule that an employee cannot recover for an injury received from a danger which is naturally and necessarily incident to work he is hired to do, and which is apparent to a reasonably prudent man, is not applicable to a case where a miner working on a tunnel of defendant in a narrow gulch, some eight hundred feet below another tunnel operated by defendant, is injured by a rock thrown from the upper tunnel, when it had not been customary to roll them down that particular gulch, and they could have been disposed of by throwing them down another gulch, where no work was going on.

APPEAL — ERRORS NOT URGED BELOW — ADMISSION OF EVIDENCE.

Where evidence as to the incompetency of a mine superintendent was admitted without objection, in an action against the company for injuries resulting from his negligence, and the defendant tried its cause on that issue, it cannot urge on appeal that the court erred in submitting the question to the jury.

EXCESSIVE DAMAGES.

In an action for personal injuries a verdict for \$8,500 cannot be said to be so excessive as to indicate passion and prejudice on the part of the jury, when it appears that plaintiff was a young man, that, in addition to the suffering which he endured and the expense incurred, his foot was so badly mashed through defendant's negligence that it was necessary to remove a portion of the bones, leaving him permanently maimed.

Appeal from Superior Court, King County—Hon. E. D. BENSON, Judge. Affirmed.

Milo A. Root, for appellant.

Bausman, Kelleher & Emory, for respondent.

Mar. 1901.] Opinion of the Court—DUNBAR, J.

The opinion of the court was delivered by

DUNBAR, J.—The respondent sued the appellant for damages alleged to have been sustained from injury caused by a stone rolling down the mountain side and striking his foot. The appellant, which is a mining company, was operating two tunnels on the side of a mountain,—one eight or nine hundred feet below the other. The work at the upper tunnel was operated by one gang of men, and the second or lower tunnel was operated by a separate gang of men. These working camps were situated in a narrow gorge in the side of the mountain. The testimony shows that Mr. Hager was the president of the company, and in control of all the company's affairs and operations. There were two mining superintendents,—Mr. Ellis, who superintended the upper tunnel, and Mr. Williams, who superintended the lower tunnel. Each of these two men had charge of his respective tunnel and his respective gang of men, had authority to control and direct their operations, and had absolute control, subject only to the orders of the president. Mr. Uren was working at the lower tunnel. The canyon was shaped like a chute, being from twelve to eighteen feet wide, with high walls on each side. On the morning of the accident, Uren was drilling. He had been at work about half an hour in the mouth of the lower tunnel. A short distance up the hill above the mouth of the tunnel there was a blacksmith shop, where there were a forge, bellows, and anvil, which were kept there for the purpose of sharpening tools. Uren had left the mouth of the lower tunnel, and started up this canyon to the blacksmith shop, for the purpose of sharpening his tools, and had just arrived at the shop, when he saw a rock coming down through the canyon with great velocity. In attempting to avoid the rock by moving forward, he was struck by the same

on the foot, and his foot was mashed to such an extent that he had to have a portion of the bones of the foot removed, and, according to the testimony, was permanently maimed. Upon the trial of the cause, judgment was rendered in his favor for \$8,500.

The appellant alleges several errors, and we notice them in the order of its argument: The first contention is that the complaint was not sufficient, under the statutes,—that the facts were not sufficiently set forth to sustain the testimony introduced. There was no demurrer to the complaint, and it will, therefore, be construed liberally in favor of its sufficiency. However, we think the complaint was sufficient, under any circumstances. After alleging employment, etc., paragraph 3 of the complaint is as follows:

“That on or about the 4th day of October, 1899, and while said plaintiff was in the performance of his duties as an employee of said corporation at a point situated below one of the tunnels upon said defendant’s said mining claim, the above named defendant, under and by virtue of the orders and direction of its president and general superintendent and foreman, so negligently, carelessly, wrongfully, and wilfully cleaned out and removed from the mouth of said upper tunnel certain large masses of rock, that said masses of rock were precipitated from the mouth of said tunnel and down the mountain side, upon which said claim is situated, in such a manner that one of said masses of rock struck against said plaintiff with great violence.”

Paragraph 4 alleges the injury for which the damages are claimed.

It is contended by the respondent that, under a general allegation, any fact tending to contribute to the injury was admissible, and many cases are cited to sustain this contention. It is not, however, necessary to review the cases cited; for this court in *Cogswell v. West Street, etc.*,

Ry. Co., 5 Wash. 46 (31 Pac. 411), established the doctrine that, under a general allegation of negligence, any fact tending to contribute approximately to the injury was admissible. In that case it was held that under an allegation in the complaint for damages that the defendant so negligently and unskillfully conducted itself in the management of its car that, through the negligence of defendant and its servants in guiding the car, plaintiff was injured, it was admissible to prove defects in the brake rod of the car. In a late case decided by this court, viz., *Collett v. Northern Pacific Ry. Co.*, 23 Wash. 600 (63 Pac. 225), it was held that, when defendant was notified by the complaint with what negligence he was charged, he was thereby informed that the circumstances which tended to show whether he was wanting in due care would be in issue. The question was discussed at length in that case, and the authorities cited, and it would be of no avail to repeat the argument or review the authorities again. We think the complaint is sufficient.

The next contention is that the evidence does not prove that the respondent was struck by the rock that was thrown down the canyon by the plaintiff. This is a question which was submitted to the discretion of the jury, and, there being sufficient testimony to warrant it in coming to the conclusion that the respondent was struck by the particular rock described, its verdict will not be disturbed in that contention. It is not, however, necessary to review the cases cited; for this court, in *Cogswell v. West Street, etc.*, particular.

The next contention is that the respondent was injured by the action of fellow servants. This contention is also untenable. The work of removing the rocks was done under the supervision of one Beach, who had control of the work at that time, and had been instructed by Ellis, the

tunnel superintendent, to throw the rock down the canyon. Beach was evidently acting as a vice principal, and the men working with him were working under his supervision and control, although there seems to be sufficient testimony here to warrant the jury in concluding that not only Beach, but Hager, the president, and Ellis, the superintendent of the upper tunnel, as well as Williams, the superintendent of the lower tunnel, were all guilty of negligence; for the testimony shows—and we are speaking of the testimony of the plaintiff—that this work was planned and the manner of its execution directed by the president, and that Williams, the superintendent of the lower tunnel, was notified on the morning of the accident that the rock would be thrown down the gorge, but that he neglected to notify the respondent of that fact when he went to work. The doctrine of fellow servants has been discussed at such length and so often by this court that it seems profitless to again enter into a discussion of the subject and an analysis of the authorities. In *Zintek v. Stimson Mill Co.*, 9 Wash. 395 (37 Pac. 340), it was held that the yard boss of a lumber yard, whose duty it was to superintend the piling of lumber therein, and direct the workmen engaged in said work, who were subject to his order and control, stood in the position of vice principal, instead of fellow servant, of such workmen, although he occasionally performed other work, and although his authority to hire and discharge men was subject to the approval of the general superintendent. The subject was reviewed again at length in *Hammarberg v. St. Paul & Tacoma Lumber Co.*, 19 Wash. 537 (53 Pac. 727), where it was said that the rule was well established that, in order to constitute one a fellow servant, he must be in the same common employment of the one who has suffered from his negligence; citing approvingly *Cooper v. Mullins*, 30 Ga. 146 (76 Am. Dec. 638), where it was held

that none were deemed to be in a common employment who had no opportunity to use precautions against each other's negligence. Again, in a case recently decided by this court and not yet reported, viz., *Shannon v. Consolidated Tiger & Poorman Mining Co.*, ante, p. 119 (64 Pac. 169), a case very much like the case at bar, where three shifts of men were working, and a man in one shift was injured through the negligence of the men in another shift in leaving an unexploded blast, and the boss or man in control failed to notify the men comprising the incoming shift of the danger which threatened them, it was held that the doctrine of fellow servants did not obtain in that case. In fact, we cannot understand how, under any theory of law, the man in charge of the work at the upper tunnel could be held to be a fellow servant with an employee working under another superintendent in another locality, and where no supervision of each other's work was possible. There can be no question but that it was negligence on the part of the appellant to throw these rocks down this narrow gorge, where men were working below, under the circumstances as shown by the testimony in this case.

It is asserted, in the fourth place, that it is well settled by the decisions of this as well as other courts, that an employee cannot recover for an injury from a danger which is naturally and necessarily incident to the work he is hired to do, and which is apparent to a reasonably prudent man. This proposition of law cannot be gainsaid, but it seems to have no application to the case at bar. The testimony does not show, as is asserted by the appellant in its brief, that it was usual for rocks to be rolled down this hill. On the contrary, not only the respondent, but other witnesses, testified that such was not the custom, and that they had never known of rocks before that time having been rolled down by the workmen from above. It was evidently con-

sidered by the operators at the tunnel above a dangerous thing to do; for they notified Williams, the superintendent of the lower tunnel, that they were about to commence throwing rocks down the gulch. But there was no testimony that this knowledge was conveyed to the respondent. In fact, the testimony is conclusive that it was not. Hence the danger which culminated in the injury received by respondent was not apparent to him, and was not naturally incident to his employment; for the testimony shows that, if the work had been done in a workmanlike and cautious manner, the rocks could have been thrown down another gulch, where no work was going on, and that it was not necessary for the promotion of the work to throw them down the gulch where the respondent was working.

The next contention is that the court erred in submitting the question of the incompetency of Superintendent Ellis to the jury. But, in addition to the fact that, under the theory of law which we have discussed above, the testimony was competent under the general averments of negligence incorporated in the complaint, the testimony was introduced without objection, and the appellant introduced proof tending to show the competency of Ellis as a mining superintendent. Having elected to try its cause on this issue, the appellant cannot ask to have the judgment reversed because it failed in maintaining that issue before the jury. 11 Enc. Pl. & Pr., p. 165.

The instructions asked for by the appellant which had not already in substance been given by the court have been disposed of by what has been said on the different points raised above. It appears plainly from the record that there was sufficient testimony to warrant the jury in finding the defendant guilty of negligence in its manner of operating the mine, to find that the respondent was not guilty of contributory negligence, and that his injury was

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caused by the negligent manner of operating the mine as alleged in the complaint:

It is finally contended that the verdict was so excessive that it indicates passion and prejudice on the part of the jury. But, from the injury which was evidently sustained by the plaintiff, who was a young man, and who by reason of the injury will be compelled to go through life maimed, in addition to the suffering which he endured and the expense incurred, we cannot say that it appears that the verdict was rendered through passion or prejudice.

The cause having been tried to the jury under proper instructions, and there having been evidence sufficient to maintain the verdict, the judgment is affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3794. Decided March 14, 1901.]

GEORGE BIRD, *Appellant*, v. HENRY WINYER *et al.*, *Respondents*.

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JURISDICTION OF STATE COURTS — QUESTIONS INVOLVING TITLE TO PUBLIC LANDS.

The superior court of this state has jurisdiction, in the absence of any statutory enactment to the contrary, to determine questions between Indians regarding Indian lands within the state, which have been allotted under the treaties and statutes of the United States.

QUIETING TITLE — RIGHT OF OCCUPANT TO MAINTAIN ACTION.

Any person in possession of land, although not the owner of the fee, may maintain an action for the purpose of quieting his title thereto, so as to avoid any uncertainty in his holding, under Bal. Code, § 5521, which provides that any person in possession of real property may maintain a civil action against any person claiming an interest in said real property, or any right thereto, adverse to him, for the purpose of determining such claim, estate or interest.

PUBLIC LANDS — ALLOTMENT TO INDIANS — NATURE OF TITLE — RIGHT OF INHERITANCE.

Under the sixth article of the treaty of 1854 with the Nisqually and other tribes (10 U. S. St. at Large, 1044), which provides that the president may assign to each Indian family of two, one quarter section of land, to each family of three and not exceeding five, one half section, and to larger families, more in proportion, if such Indians will locate on the same as a permanent home; may issue patent therefor conditioned against power of alienating the lands; and may cancel the assignment in case such family neglect to occupy and till a portion of the assigned lands, nothing passes by patent except the right of possession and occupancy of the lands described, but the absolute fee remains in the government, and hence, upon the death of the wife, no rights would pass by inheritance to the children of the wife by a former marriage, where an assignment of a quarter section had been made to her husband as the head of a family composed of himself and wife, and the land granted to him as the head of said family and to his heirs.

Appeal from Superior Court, Pierce County.—Hon. JAMES A. WILLIAMSON, Judge. Reversed.

George T. Reid (*James Wickersham* and *Reid & Meade*, of counsel), for appellant.

Samuel F. McAnally, for respondents.

The opinion of the court was delivered by

MOUNT, J.—The plaintiff brings suit against the defendants to remove a cloud from title to certain real estate, and alleges substantially as follows: That he was born of Indian parents, a member of the tribe of Puyallup Indians, on the Puyallup Indian reservation, in the state of Washington. That under the terms of the treaty of December 26, 1854, between the United States and the said Puyallup Indians, he was entitled to have, and there was allotted, assigned, and patented to him in severalty, forty acres of land on said reservation, as follows: the northeast quarter of the southwest quarter of section 12, town-

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ship 20 north, range 3 east, W. M. That on January 17, 1881, with his wife, Mary Bird, an Indian woman, also a member of said tribe, he accepted said allotment, located upon, improved, and occupied the same continuously thereafter, and is now in possession thereof, occupying the same as a permanent home. That on January 30, 1886, a patent issued to him, as follows:

“The United States of America, to all to whom these presents shall come, Greeting:

“Whereas, by the sixth article of the treaty concluded on the twenty-sixth day of December, Anno Domini one thousand eight hundred and fifty-four, between Isaac I. Stevens, governor and superintendent of Indian affairs of Washington Territory, on the part of the United States, and the chiefs, headmen and delegates of the Nisqually, Puyallup, Steilacoom, Squawskin, S’Homamish, Stehchass, T’Peeksin, Squiaitl, and Sa-heh-wamish tribes and bands of Indians, it is provided that the president, ‘at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable;’

“And Whereas, there has been deposited in the General Land Office of the United States an order bearing date January 20th, 1886, from the Secretary of the Interior, accompanied by a return dated October 30th, 1884, from the office of Indian Affairs, with a list approved October 23rd, 1884, by the president of the United States, showing the names of members of the Puyallup band of Indians who have made selections of land in accordance with the provisions of the said treaties, in which list the following tracts of land have been designated as the selection of Teo-away or George Bird, the head of a family consisting of himself and Mary, viz: the southwest quarter of the northwest quarter of section fifteen (40.00 acres), the south-

east quarter of the northeast quarter and the northeast quarter of the southeast quarter of section sixteen (80.00 acres), in township twenty-one north, and the northeast quarter of the southwest quarter of section twelve (40.00 acres), in township twenty north, of range three east of the Willamette Meridian, Washington Territory, containing in the aggregate one hundred and sixty acres;

“Now know ye, that the United States of America, in consideration of the premises, and in accordance with the directions of the president of the United States, under the aforesaid sixth article of the treaty of the sixteenth day of March, Anno Domini one thousand eight hundred and fifty-four, with the Omaha Indians, has given and granted, and by these presents does give and grant, unto the said Teo-away, or George Bird, as the head of the family as aforesaid, and to his heirs, the tracts of land above described, but with the stipulation contained in the said sixth article of the treaty with the Omaha Indians, that the said tracts shall not be alienated or leased for a longer term than two years, and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force until a state constitution embracing such lands within its boundaries shall have been formed, and the legislature of the state shall remove the restrictions; and no state legislature shall remove the restrictions without the consent of Congress.

“To have and to hold the said tracts of land, with the appurtenances, unto the said Teo-away, or George Bird, as the head of the family as aforesaid, and to his heirs forever, with the stipulation aforesaid.

“In testimony whereof I, Grover Cleveland, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

“Given under my hand, at the city of Washington, this thirtieth day of January, in the year of our Lord one thousand eight hundred and eighty-six, and of the independence of the United States the one hundred and tenth.

By the president:

Grover Cleveland.

By M. McKean, Secretary.

S. W. Clark, Recorder of the General Land Office.”

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That plaintiff and Mary Bird had no children of their own, but Mary Bird had two children by a former husband. That these two children did not live with plaintiff and Mary, and were not a part of the family. That about August 15, 1887, Mary died intestate, and defendants thereupon set up a claim to an undivided one-half interest in said lands, which claim is without any right, operates as a cloud upon plaintiff's title and the rents and profits of said premises, and causes plaintiff irreparable injury. That both plaintiff and defendants are citizens of the United States and residents of the state of Washington. A demurrer was filed by the defendants to the complaint on the grounds that the court had no jurisdiction, and that the said complaint did not state a cause of action. This demurrer being overruled, and exception taken, defendants thereupon filed their answer admitting all the allegations of the complaint, and alleged in substance as follows: That the title to said lands remains in the government of the United States, and that this cause cannot be heard and determined without making the United States government a party to the suit; and, second, that a commission was appointed by the United States, whose duty it was to ascertain and determine the true owners of said land, and that said commission did thereafter ascertain and determine the ownership thereof, and found that the defendants were the owners of an undivided one-half thereof, and that the same was duly reported to the secretary of the interior, and that the said findings and determinations were duly approved by said secretary and are conclusive and binding upon the plaintiff in this action; and third, that when the patent aforesaid was issued to said George Bird it was issued under the provisions of the treaty before

set out, and was for the benefit of the said family, and that Mary Bird, his wife, by said patent, took an equal interest in and to the said land with the plaintiff. That defendants are heirs at law of said Mary Bird, and that upon the death of said Mary Bird, as aforesaid, the defendants herein became and are entitled to the said undivided one-half thereof. A demurrer by the plaintiff to the first two causes of defense above set out was sustained by the court, but as to the third was overruled, the said demurrer being to each of the said causes, for the reason that the facts stated did not constitute a defense. The plaintiff electing to stand upon his demurrer to the answer, the court made an order dismissing the said action. Plaintiff appeals from the said order of dismissal, and the defendants appeal from that part of the order sustaining the demurrer to the first and second answers, and also from the order of the court overruling the demurrer to the complaint.

The section of the treaty referred to is found in 10 U. S. St. at Large, 1044, and is as follows:

“The president may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians [Indian or families] of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one-quarter section; to each family of three and not exceeding five, one-half section; and to each family of six and not exceeding ten, one section; and to each family over ten in number, one-quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoy-

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ment of such permanent home and the improvements thereon. And the president may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a state constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the state shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the president may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations as may hereafter be prescribed by the Congress or president of the United States. No state legislature shall remove the restrictions herein provided for, without the consent of Congress."

Three questions are presented to this court upon this appeal, as follows: (1) Have state courts jurisdiction of the parties and the subject matter? (2) Does the complaint state a cause of action? (3) Did Mary Bird at the time of her death have any interest in the lands in question which could descend to her heirs by a former husband? Upon the question of jurisdiction of state courts

to determine adverse claims of parties as in this case, no authorities are cited to the effect that the state courts have not jurisdiction. Since the courts of the state are courts of general jurisdiction, we assume that, unless want of jurisdiction is shown to exist under positive law, it rests in the state courts. 17 Am. & Eng. Enc. Law (2d ed.), p. 1073; 24 U. S. St. at Large, p. 390, § 6;; *Wa-la-note-the-tynin v. Carter* (Idaho), 53 Pac. 106; *Swartzel v. Rogers*, 3 Kan. 374; *Felix v. Patrick*, 145 U. S. 332 (12 Sup. Ct. 862).

These authorities seem to us to be in point to the effect that the state courts have jurisdiction to determine questions between Indians regarding Indian lands within the state.

2. Section 5521, Bal. Code, omitting the parenthetical expressions thereof, is as follows:

“Any person in possession . . . of real property . . . may maintain a civil action against any person or persons . . . claiming an interest in said real property or any part thereof or any right thereto, adverse to him, . . . for the purpose of determining such claim, estate or interest;” etc.

This section it would seem needs no argument in support of its construction. There is no requirement here that the plaintiff must have or claim to have title, as in some other states. Under the common-law action to remove cloud the plaintiff must be in possession. He must have been disturbed in his possession, and he must have established his right by successive judgments in his favor. Adams, Equity, p. 202; Pomeroy, Equity Jurisprudence, § 248; Bispham, Equity (5th ed.), § 568.

The section above quoted, for obvious reasons, has done away with the provisions of the common law, and also, in common with statutes in other states in the Union, has obviated the necessity of alleging and proving title. Any

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person in possession may maintain the action for the purpose of quieting his own or his adversary's claim there-to so as to avoid any uncertainty in his holding. It is said, in *McDonald v. Early*, 15 Neb. 63, where the action arose under a lease of school lands from the state:

"A leasehold estate, running for twenty-five years in a valuable piece of property, may be of vastly greater value than a fee simple title to another piece. Besides, as we have already seen, the remedy at common law is not confined to real property at all and the statute is an enlarging rather than a restricting one. A vast amount of valuable lands belonging to one of the most sacred trust funds of the state, is now held by citizens under leases like the one copied in the petition in the case at bar. The method of obtaining these leases, as well as the payments and other duties necessary to keep them alive, are quite complicated. It is, therefore, not improbable that many cases of conflicting claims under such leases may arise, involving important property rights. Of such character is probably the case at bar. No doubt, while the facts are of comparatively recent occurrence, all such conflicting claims may be settled upon terms of justice and equity, but which might be impossible after the lapse of considerable time; and to such purpose I regard the remedy by petition in the nature of a bill *quia timet*, as quite appropriate."

See, also, *Smith v. Wingard*, 3 Wash. T. 291 (13 Pac. 717); *Holland v. Challen*, 110 U. S. 15 (3 Sup. Ct. 495); *Reynolds v. Crawfordsville Bank*, 112 U. S. 405 (5 Sup. Ct. 213); *Watson v. Glover*, 21 Wash. 677 (59 Pac. 516).

The complaint in this case states a cause of action.

3. By article six of the treaty above set out it is provided that the president may, at his discretion, cause the lands reserved to be surveyed, and assigned to such family or families as are willing to avail of the privilege, and locate on the same as a permanent home; and

he may prescribe such rules and regulations as will insure to the family in case of the death of the head thereof the possession and enjoyment of such permanent home and the improvements thereon. The patent in this case was issued to George Bird as the head of a family consisting of himself and Mary Bird, and to *his* heirs. It is argued by respondents that, since the treaty authorizes the president to issue a patent to such family, when patent issued to the head of the family, Mary Bird, his wife, took an equal interest with George Bird. It will be observed that, while patent issued, no title which could be alienated, except by a lease for two years, vested in the patentee. The patent gave the patentee the right of possession while the family occupied and tilled a portion of the lands, but under the patent and the treaty there was no power to sell. *Ells v. Ross*, 64 Fed. 417. Provision is also made that, when the family neglect to occupy and till a portion of the land, the president may cancel such assignment, and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe. So that it is clear that the grantees under the patent obtained only the possession and right of occupancy of the lands described. There was simply a defeasible title conveyed, and that is the condition of the estate at the present time. When Mary Bird died, no greater estate was created thereby, and the only remaining member of the family might at any time forfeit all right to possession by failure to occupy and till a portion of the lands, or by roving from place to place. Admitting, therefore, that Mary Bird took an equal interest with George Bird at the date of the patent, she took only the right to occupy and till the premises while the family lived upon them. In any event, at her death she left no greater interest than the

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right of her heirs to occupy and till the premises. These heirs, not being members of the family, took no other interest in the estate. The section above quoted also provides that the president may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent homes and improvements thereon. The possessory title being in the head of the family, no provision was necessary in case of the death of other members of the family. But, in case the head of the family should die, then, under the above provision, some rule may be prescribed which would insure the possession and enjoyment of such permanent home and the improvements thereon to the family. Can it be said that upon the death of a member of the family the head lost his right of possession to the interest of the deceased? If so, then upon the death of Mary one-half of the land reverted to the United States, or descended to her heirs, who were not members of the family, and who could share her interest to the exclusion of the surviving head. We think no such construction was intended. It is more reasonable to suppose that the right of possession to the whole was to continue until such time as the state and congress, acting agreeably, should convey an absolute indefeasible estate to the survivors in interest by removing the restrictions, and that during the time the government reserved the fee absolute in itself, while the family were entitled to till and occupy the premises as a permanent home, the death of either member thereof would not change the right of occupancy, or the right to enjoy the improvements thereon, but that the remaining members of the family would continue to hold and enjoy the uses and privileges for which the land was assigned by the government, viz., for the benefit of the family.

We conclude, therefore, that upon the death of Mary Bird, George Bird was entitled to the right of possession and occupancy of the premises as long as he chose to occupy them as a permanent home, and that his right of occupancy and possession could not be disturbed by the heirs of Mary Bird, after her death. Under this view, and upon this construction of the treaty hereinabove referred to, Mary Bird at the time of her death, had no interest in the land in question which could descend to her heirs by a former husband. We might content ourselves with this construction of the treaty, and say nothing more upon this question, but, in our opinion, the question may be answered in the same way for other reasons. In the case of *Summers v. Spybuck*, 1 Kan. 370, the supreme court of Kansas had under consideration a case similar to the one at bar under a very similar treaty between the United States and the tribe of Wyandotte Indians. In stating the question then to be decided the court say:

“The only question raised by the argument is, whether the competent head of a family, under that treaty, can take the title in fee simple absolute to the land allotted, assigned and patented to him according to the terms of the patent, or whether his wife and minor children, constituting his family at the time the treaty was ratified, by force of the treaty take the beneficial interest in aliquot portions, and the head of the family holds it in trust for them. The patent, conveying the land in fee simple absolute, excludes the idea of a trust, and therefore, if such trust exists, it must result from the language of the treaty, and the failure of the officers of the United States to conform to it in making the conveyance. The patent pursues the language of the treaty as to the estate granted, and the sole question remains: Was the conveyance of the land for the family in conformity with the treaty?”

After considering the treaty, the court come to this conclusion:

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"The true construction of the treaty, we think, is that lands are taken, assigned and patented to the heads of families 'for or on account of the other members of the family.' Such use of the word 'for' is legitimate; and, considering the practice of the government, established by law in the year 1847 and continued ever since, of making all Indian payments for the whole family to its head, it is probable that both parties to the treaty so used and understood it. Such construction renders the whole treaty harmonious, and consistent with the action of the officers of the government in conveying all the land for the family to John Pipe, its head."

This case is cited and followed by United States Circuit Court Judge DILLON, in *Hicks v. Butrick*, 12 Fed. Cas. No. 6458, in an action arising under the same treaty. In these cases the patentees took an indefeasible estate, and could, therefore, alienate the same. Under these authorities, even although an absolute indefeasible estate had vested in the patentee in this case, upon the death of Mary Bird the property descended to George Bird and his heirs. The case at bar is different from those cases, however, in this: that George Bird and Mary Bird took nothing except the right of possession and occupancy.

We are, therefore, of the opinion that the state courts have jurisdiction, that the complaint stated a cause of action, and that the answer of the defendant constituted no defense thereto. The cause is reversed, with instructions to the lower court to vacate the order of dismissal, and sustain the demurrer of plaintiff to the answer, in accordance with this opinion.

REAVIS, C. J., and DUNBAR, FULLERTON and ANDERS, JJ., concur.

[No. 3722. Decided March 20, 1901.]

R. J. REEVES, *Executor, et al.*, Appellants, v. SCHOOL DISTRICT No. 59 OF LINCOLN COUNTY, WASHINGTON, *et al.*, Respondents.

WILLS — CONSTRUCTION — DEATH OF DEVISEE.

Under Bal. Code, § 4608, which provides that "Every devise of land in any will shall be construed to convey all the estate of the devisor therein, unless it shall clearly appear by the will that he intended to convey a less estate," a will must be construed as passing an absolute fee-simple title to the devisee named, instead of a life estate, when the will devises "the balance of my property, real and personal, to my cripple son, Charles. . . . In case of his death it is my desire that my sole property shall be applied to the school fund of Wilbur," since, in the absence of a clear intent to convey a less estate, it must be construed that the testator had reference to the possibility of the devisee's death before his own.

Appeal from Superior Court, Douglas County.—Hon. CHARLES H. NEAL, Judge. Reversed.

Danson & Huneke, for appellants.

Myers & Warren, Mount & Merritt, N. T. Caton and E. A. Hesseltine, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—This is a petition for distribution of the estate of Samuel Wilbur Condit, deceased, under the provisions of the following will:

"Condit's Ferry, Jan. 19th, 1895. Know all men by these presents, that I, Samuel Wilbur Condit, being in my right mind, and knowing that life is uncertain, do make my last will and testament on this day of our Lord, January the nineteenth, eighteen hundred and ninety-five. It is my desire to give my son George Condit my property known as 'Condit's Ferry,' and to will and bequeath to

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my son Willie Condit five dollars and fifty cents; the balance of my property, real and personal, to my cripple son, Charles, excepting my interest that myself and R. J. Reeves hold jointly on section eight. I will my interest on the same to R. J. Reeves, and his heirs and assigns. I also appoint R. J. Reeves my administrator and executor, without bonds, stipulating that he see to my cripple son, Charles, and that he is well taken care of as long as he lives. My property known as the 'Mitchell Place' I bequeath to R. J. Reeves, provided he pays the mortgage on the same. It is my desire that R. J. Reeves rents my property, and applies the rents to the maintenance of my cripple son, Charles. In case of his death, it is my desire that my sole property shall be applied to the school fund of Wilbur, and also that there be enough sold to pay all my just debts. Hoping and trusting that R. J. Reeves will act in good faith, I revoke all former wills up to this date. Witness my hand and seal. Samuel Wilbur Condit. Witnesses: George G. James, Bert L. Woodin."

The testator left surviving him his three children, Willie, George, and Charles Condit. Said Charles Condit, the cripple son to whom the main portion of the estate was devised, died on the 21st of May, 1899, under the age of 21 years, single and leaving no will. The devisor, Samuel Wilbur Condit, died a few days after the execution of the will. Willie Condit and George Condit were the issue of the marriage between deceased and Julia Condit, the marriage being entered into during the year 1875. The deceased afterwards obtained a divorce from the said Julia Condit, and the property left by him was acquired by him subsequent to obtaining said divorce. The petitioner Mary Ann is an Indian woman, and the mother of said Charles Condit, deceased, who was born as the result of unlawful cohabitation of said Samuel Wilbur Condit and said Mary Ann. After hearing the evidence, the court made findings of fact and conclusions of law, and in accordance therewith entered a decree distributing the property specifically de-

vised to said Willie Condit, George Condit, and R. J. Reeves, respectively, and the residue of said estate to school district No. 59 of Lincoln county, Washington. The court construed the will to the effect that it was the intention of the devisor that, in case of the death of the devisor, the property which was devised to the said son Charles should be applied to the school fund of Wilbur, and the school fund of Wilbur was construed to be school district No. 59 of Lincoln county. The appellants' contention is that it was the intention of the devisor to give to Charles Condit an absolute title in fee simple of the property devised to him, and that the property was to be applied to the school fund only in case of the death of the said Charles Condit before the death of the devisor; that, the property having passed absolutely to Charles, his heirs,—in this case, Mary Ann,—would heir the property, instead of the school fund. It is also contended that there is nothing in the language used in the will to indicate that the devisor referred to school district No. 59 of Lincoln county. As we construe this will, it is not necessary to discuss this proposition. We think there was sufficient testimony to show that Mary Ann was the mother of Charles Condit, that Samuel Wilbur Condit was divorced from Julia Condit prior to the accumulation of the property in question, and that Mary Ann has sufficient standing in the court to have her rights litigated.

This brings us to the main question in the case, viz. the construction of the will, and to the pertinent query whether it was the intention of the testator that his property should revert to the school district or to the school fund of Wilbur in case his son Charles died after the testator, or whether it was his intention to bestow upon him an absolute fee-simple title in the estate to vest in him and his heirs. We think the will must be construed in accordance with the

contention of the appellants. Section 4608, Ballinger's Code, provides that

"Every devise of land in any will shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that he intended to convey a less estate."

Under this special provision of the statute the presumption must be that in this instance the absolute estate passed to Charles, unless it clearly appears from the will that such was not the intention of the testator. The granting portion of the will is definite and certain, viz. "the balance of my property, real and personal, to my cripple son, Charles." This is an unequivocal, direct, and positive devise of an absolute estate, and is not to be restricted, under all authority, by ambiguous and uncertain provisions following in the will. The provision that in case of his death it was the desire of the testator that the property should be applied to the school fund of Wilbur is a provision which in character is common in wills, and has received judicial construction to the effect that in such cases it was the intention of the testator to pass an absolute title to the devisee, and that the death referred to was that of the devisee before the death of the testator; that is to say, that, in this case, if Charles had died before the testator, the property, under the will already executed, would have passed to the school fund, but upon the death of the testator during the life of the devisee the will conveys an absolute title to the devisee. In *Benson v. Corbin*, 145 N. Y. 351 (40 N. E. 11), where the testator devised his real estate to his children, conditioned that in case of the death of the children, leaving no issue, the property devised to them and their issue should pass to a certain missionary society, it was decided that the missionary society should take only in case of the death of the children in the testator's lifetime. In that case the court quoted from *Vanderzee v.*

Slingerland, 103 N. Y. 55 (8 N. E. 247), the following language from the opinion of the court:

“Where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, followed by a devise over in case of his death without issue, it has I think been uniformly held in England, and it is the rule supported by the preponderance of judicial authority in this country, that the words refer to a death without issue in the lifetime of the testator, and the primary devisee surviving the testator takes an absolute estate in fee-simple;” citing *Washbon v. Cope*, 144 N. Y. 297 (39 N. E. 388).

And the court, in the course of its opinion said:

“Where there is primarily a clear and certain devise of a fee, about which the testamentary intention is obvious and without ambiguity, the estate thus given will not be cut down or lessened by subsequent words which are ambiguous or of doubtful meaning. If a slight circumstance or a slender reason will in ordinary cases prevent the application of the general rule, the circumstance or the reason must be strong and decisive where the construction collides with a plain devise in fee, and forces a change of its terms by cutting it down to a lesser estate. We do not easily trade a certainty for a doubt.”

The same rule is announced in *Beach, Wills*, § 181, in the following plain terms:

“It frequently happens that testators, after making a devise or legacy in absolute terms, add thereto a provision that, in the event of the legatee or devisee dying, the property shall pass to certain other persons, or sink into the residue of the estate. Such references to the death of the legatee are generally construed to relate to his so dying before the death of the testator, the intention of the maker of the will being presumed to be only to provide for the destination of the property in the event of lapse.”

To the same effect, 3 *Jarman, Wills*, 606, where the author in closing the argument on that proposition, says:

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“Hence it has become an established rule that where the bequest is simply to A., and in case of his death, or if he die, to B., A., surviving the testator, takes absolutely.”

See, also, as sustaining this construction, Schouler, Wills (2d ed.), § 565, and *Howard v. Carusi*, 109 U. S. 725 (3 Sup. Ct. 575), where the authorities are collated and the rule is announced as being almost universal. Also, *Moore v. Lyons*, 25 Wend. 119; *Mulvane v. Rude*, 146 Ind. 476 (45 N. E. 659); and the cases cited in the authorities above referred to. In fact, this proposition is not very strongly disputed by the respondents; but it is claimed that the rule is subject to another rule,—that the will of the testator is to be determined from the whole will, and that, in addition to that, circumstances occurring before his death may be introduced to explain or construe the language used in the will. This, no doubt, is also a well-established rule, but an examination of the record in this case and a consideration of the circumstances shown by the record are not convincing that it was not the intention of the devisor to grant an absolute title to his son Charles in the residue of his estate after making the exceptions which were made in the will. The language employed in the will is not the language of an ignorant man, but the forms of law are well preserved, technical language is used, and, in the absence of proof to the contrary, it must be presumed that the language used was used with reference to the construction that has universally been placed upon such language by courts in construing wills. The devise was specific, clear, and unambiguous. Under the provisions of our statute, it carried with it an absolute estate; and the ambiguous expressions afterwards used in the will, and the circumstances surrounding the execution of the will, are not sufficient to bring it within the other provision of the

statute, viz. "unless it shall clearly appear by the will that he intended to convey a less estate."

The judgment is reversed and remanded, with instructions to proceed in accordance with this opinion.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3500. Decided March 22, 1901.]

FANNIE MONTROSE, *Appellant*, v. JOHN BYRNE, *Executor*,
Respondent.

WILLS — PROBATE — QUESTIONS COGNIZABLE.

Questions as to the construction of a will and as to the vesting of the property mentioned in it are not cognizable in a proceeding to have the will established in probate, the only question for consideration in such a proceeding being the validity of the will.

Appeal from Superior Court, Thurston County.—Hon. OLIVER V. LINN, Judge. Affirmed.

T. L. Bland, for appellant.

Troy & Falknor, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—In July, 1899, Apollonia Hoffman died in Pierce county. She was at the time a resident of Thurston county. About three weeks prior to her death she executed her will. The will, in substance, devised her estate, real and personal, with the exception of one bequest of \$100 to a granddaughter, to the appellant, a married daughter, for life, with the remainder to two nieces of the testatrix, and appointed respondent executor, without bonds, and with full power to administer the estate without the intervention of the probate court. In September,

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1899, the will was offered for probate by the respondent, after notice, and the appellant appeared and objected to the admission of the will to probate. Appellant set out in her objections that she was the sole surviving heir of the deceased; that deceased could not read or well understand the English language; that the deceased was not of sound mind and competent to dispose of her estate, and was physically and mentally incapacitated to make the will,—and denied that deceased published and declared the instrument to be her will. A hearing was had and testimony taken in the superior court, findings of fact and conclusions of law were filed, and an order made admitting the will to probate. The court found the competency of the deceased to execute the will; that it was without undue influence, and was duly published and declared as such will. Upon exceptions made by appellant to the findings of fact, we have examined the testimony carefully, and are not disposed to disturb the conclusions of the superior court. The measure of testamentary capacity has been very fully discussed in *Re Gorkow's Estate*, 20 Wash. 563, and it is unnecessary to review the questions here. The only question for consideration in the proceeding to have the will established in probate is as to its validity. The questions which have been discussed by counsel for appellant relative to its construction and the vesting of the real and personal property mentioned in the will are not cognizable in this proceeding, and will not be further considered.

The judgment of the superior court is affirmed.

DUNBAR, FULLERTON and ANDERS, JJ., concur.

24	290
29	323
129	326
29	332
24	290
30	345

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CYRUS HAPPY, *Respondent*, v. HARRIS E. PRICKETT, *Defendant*, CHARLES N. TRAVOUS *et al.*, *Appellants*.

INTEREST—OPEN ACCOUNT.

Interest at the legal rate begins to run on an open account for services rendered from the date of full performance, at which time the right to compensation fully accrued.

ASSIGNMENT FOR BENEFIT OF CREDITORS—FOREIGN ASSIGNEE—RIGHTS OF RESIDENT CREDITORS.

An assignment for the benefit of creditors made in another state in accordance with its statutes, while passing title to the assignor's realty in this state, does so subject to the rights of creditors resident in this state to enforce claims against the assignor by suit and attachment against his property in this state.

SAME—ATTACHMENT—INTERVENTION BY FOREIGN ASSIGNEE.

A foreign assignee of an insolvent estate has the right to intervene, in a local attachment suit brought by a resident creditor against the assignor's realty in this state, for the purpose of protecting the estate against any illegality or fraud in the claims.

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge. Reversed.

A. G. Avery and *Buck & Craven*, for appellants.

W. W. Hindman, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—On December 14, 1896, defendant Harris E. Prickett and J. A. Prickett, copartners, were engaged in banking in the state of Illinois, and on that date made an assignment of their property, for the benefit of all their creditors, to the appellants, who duly qualified and now are the assignees of said estate. The assignment was duly recorded in the proper county in the state of Illinois, and on

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December 21, 1896, was recorded in the office of the auditor of Spokane county, Washington. At the time said assignment was made, defendant Harris E. Prickett, one of the assignors, was the owner of record of several parcels of real estate in Spokane county. In July, 1899, plaintiff (respondent here) commenced an action against defendant Harris E. Prickett to recover the sum of \$4,950, alleged to be due on an open account for legal services between January 1, 1891, and December 14, 1896, which was before the making of the assignment, and attached the real estate which is the subject of this controversy. Service was by publication. Upon the commencement of the action the appellants filed their petition in intervention, denying the indebtedness, pleading payment thereof, setting up the statute of limitations, setting up the matters and things heretofore stated in regard to the assignment, and praying for a dismissal. Motion to strike the petition in intervention and for judgment was made by the plaintiff and overruled; after which he replied. Thereupon the intervenors made a motion for judgment on the pleadings, which was denied, and the plaintiff made another motion for judgment against defendant as prayed for in the complaint, and dismissing the intervenors. This motion was sustained and judgment was rendered in accordance therewith. The defendant did not appear in the action.

It is evident that the complaint states a cause of action, and that the statute of limitations has not run. We also think that, under the allegations of the complaint, the plaintiff was entitled to interest on the account. Paragraph 4 of the complaint is as follows:

"That between the 1st day of January, 1891, and the 14th day of December, 1896, the plaintiff herein performed professional work, labor and services for said parties, under the firm names and style of J. A. Prickett & Sons, and J. A. Prickett & Son, at their especial instance

and request, which said work, labor and services were reasonably worth the sum of \$7,600."

And paragraph 5 reads:

"That said parties have not paid the same, or any part thereof, except the sum of \$2,650, and there is now due, owing and wholly unpaid to this plaintiff, the sum of \$4,950, together with interest thereon from the 14th day of December, 1896, to date at the rate of 8 per cent. per annum."

According to the complaint the services had all been performed and the money for the same was due on the 14th day of December, 1896. This being true, interest would run on the amount due at the legal rate from the date it became due.

This brings us to the principal question in the case, viz., did the deed of assignment made in Illinois in accordance with the statutes of Illinois pass the title to real property in this state belonging to the assignors, as against local creditors in this state? It is insisted by the appellants that a foreign voluntary assignment has the same effect as any other conveyance; that it carries with it all the force and effect of an ordinary deed or mortgage; that there is no distinction between general assignments and other conveyances of real property; and that there is a distinction between voluntary assignments made under the laws of foreign states and involuntary assignments made under bankrupt laws; while it is the contention of the respondent that the law of Illinois under which this assignment was made is, in substance, an involuntary insolvency act; that the assignee is subject to the orders and control of the court in that state, and that, although the assignment was voluntary in the sense that it was done of the free will of the assignors, still it receives its force and effect by virtue of the laws under which it was made; and that the assignees, therefore, have no greater rights

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in this state than foreign administrators or receivers. If the assignees of these insolvent debtors have any right to enforce their claims against the estate of the assignors in this state, it is a right which exists not strictly in a legal sense, but by reason of the comity existing between the different states of the Union. As we understand the usage, however, this comity only extends to citizens of other states rights which do not interfere with the enforcement of the legal privileges of citizens of this state, and rights the enforcement of which would not place citizens of this state in a more unfavorable position in attempting to enforce their own rights than they would have been in had not such comity been extended. Making the application to the case in point, the respondent here certainly had a legal right to recover his debt by the adequate remedy which he sought by suit and attachment; and comity should not extend so far as to deprive him of this plain and adequate remedy, and compel him to seek the aid of a foreign tribunal to protect his interests. Many cases are cited by the respondent to support this contention. It is insisted by the appellants, however, that none of them are in point, with the exception of *Heyer v. Alexander*, 108 Ill. 395, which, it is conceded, decided that a non-resident debtor having real estate in the state of Illinois could pass the same to his assignee by deed of assignment executed in his state, where such debtor had no creditors resident in the state, but that such conveyance would not be allowed to withdraw the debtor's assets and means from the state of Illinois to the detriment or injury of domestic creditors, and that it was subject to the claims of resident creditors where the property was located. The court in this case, after quoting from *Chafee v. Fourth National Bank of New York*, 71 Me. 514 (36 Am. Rep. 345), said:

"The doctrine is, that such a conveyance is subject to the claims of resident creditors where the property is located. This we regard as the true rule. It is not just or fair that creditors in this state should be compelled to go to a foreign state to receive a *pro rata* share of the debtor's property, when they perhaps extended credit alone upon the faith of the debtor's property in this state, and to which they looked for payment."

It is said by the appellants that the case of *Chafee v. Fourth National Bank*, *supra*, does not sustain the view expressed by the Illinois court in *Heyer v. Alexander*, but we think it does. While the language quoted in the Illinois case as the language of the court in *Chafee v. Fourth National Bank*, was not the language of the court in that case, but was a quotation by that court from *Fox v. Adams*, 5 Me. 245, it is none the less in point; for that court, after discriminating between an assignment made by an insolvent debtor in another jurisdiction where it was assailed by an attaching creditor in another state, and an assignment made by an insolvent debtor in another jurisdiction where it was assailed by an attaching resident creditor, held that in the first instance it would defeat the attaching creditor, and that in the second instance the attaching resident creditor would defeat the assignment, and, in answer to the contention that comity required the sustaining of the foreign assignment, said: "Comity between states is not thus to be extended to the *prejudice of our own citizens*." The court in *Chafee v. Fourth National Bank*, adds:

"Such is the language of the court; and we think it clearly implies that while a foreign assignment will not be permitted to defeat the attachment of a domestic creditor, it will have that effect upon foreign creditors. The reason of the rule clearly implies this. It is the supposed duty of every government to protect its own citizens, a duty which it does not owe to foreigners."

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Many cases on this proposition are cited in *Chafee v. Fourth National Bank*. It is insisted by the appellants that all of the cases excepting *Heyer v. Alexander, supra*, are cases of involuntary assignment, and that the rule in that case is different. But some of the cases are where the assignment was voluntary, and others where it was involuntary, and many of the courts hold that there is no difference in effect between a voluntary and an involuntary assignment. Thus, in *Upton v. Hubbard*, 28 Conn. 275 (73 Am. Dec. 670), a case which the appellants dismiss with the remark that it is not in point,—it was held that it made no difference with regard to the rights of the assignee in a foreign state whether the estate of the insolvent was vested in him under legal proceedings instituted against him by the insolvent, or under legal proceedings which had been had under the voluntary assignment of the insolvent himself; that the assignee was still the agent of the law, deriving from it his authority. In *Hanchett v. Waterbury*, 115 Ill. 224 (32 N. E. 194), the court construed an assignment law, substantially like the assignment law existing in Illinois now, and under which the present assignment was made, as an involuntary assignment act. It is true that in the case of *Whitman v. Mast, Buford & Burwell Co.*, 11 Wash. 318 (39 Pac. 649, 48 Am. St. Rep. 874), it was held by a divided court that an assignment for the benefit of creditors by a debtor in Minnesota of all his property, made under the provisions of the insolvency act of that state, was a voluntary assignment when made upon the motion of the debtor himself and would pass the personal property of the debtor in the state of Washington to his assignee. It may be that no sensible distinction can be made between the application of the rule to personal property and that to real estate. But in that case the contest was between the foreign as-

signees from Minnesota and a foreign attaching creditor, the attaching creditor being a resident of Missouri. So that the case can be distinguished under the rule announced in *Fox v. Adams*, *supra*. It is true, too, that there is some dictum in the case which supports appellants' contention; the contention of the respondent in that case being that the supreme court of Minnesota, in the case of *Jenks v. Ludden*, 34 Minn. 482 (27 N. W. 188), had construed the Minnesota statute to be in effect an involuntary bankrupt act. In that case the court said:

"Now, our insolvent law and the statute of Wisconsin, regarding assignments for the benefit of creditors, are essentially different. Our act of 1881, is, as we have repeatedly held, a bankrupt act, the assignee being in effect an officer of the court, and the assigned property being in *custodia legis*, and administered by the court or under its direction."

And, after reviewing some subsequent cases, notably *Covey v. Cutler*, 55 Minn. 18 (56 N. W. 255),—it was thought that the Minnesota court had retreated from the doctrine laid down in the *Ludden Case*. But the construction of the Minnesota cases was afterwards indulged in by the supreme court of the United States in *Security Trust Co. v. Dodd, Mead & Co.*, 173 U.S. 624 (19 Sup. Ct. 545); and that court came to the conclusion, after reviewing the *Ludden Case* and the subsequent cases from the Minnesota supreme court, that it was not the intention of the supreme court of Minnesota to overrule its prior decision to the effect that the act was practically a bankrupt or insolvency law. While this decision is not binding upon us, the distinguished character of the court must necessarily have great weight with us. But, while the supreme court of the United States sought to ascertain the construction placed upon this statute by the supreme court of Minnesota, it went further, and reviewed at large the question

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in discussion here, and obliterated the distinction, so far as the rights of the resident creditors are concerned, between assignments made under voluntary and what might be termed involuntary statutes. This we think is the better rule. While it is true that the assignment proceedings are instituted voluntarily by the assignor, yet the assignment is given effect by the local statutes, and the assignor in the disposition of his property is no longer guided and controlled by his free will; but is subjected to the operations and directions of the law of a state foreign to the local creditors. He has subjected his will to that dominion, and, to all practical intents and purposes, his acts cease to be voluntary, and are controlled by the rules of law prescribed by the legislature of that state, as inflexibly as though the proceeding in its inception had been involuntary. The supreme court of the United States in the case above cited, passing from the construction of the Minnesota statute, says:

“So far as the courts of other states have passed upon the question they have generally held that any state law upon the subject of assignments, which limits the distribution of the debtor’s property to such of his creditors as shall file releases of their demands, is to all intents and purposes an insolvent law; that a title to personal property acquired under such laws will not be recognized in another state, when it comes in conflict with the rights of creditors pursuing their remedy there against the property of the debtor, though the proceedings were instituted subsequent to and with notice of the assignment in insolvency.”

And it asserted that the weight of authority was to the effect that it makes no difference whether the estate of the insolvent is vested in the foreign assignee under proceedings instituted against the insolvent, or upon the voluntary application of the insolvent himself, alleging the rule to be that in case of a voluntary assignment the assignment would be respected in the foreign state, subject only to the

interest of local creditors, while in the case of an involuntary assignment it would not be regarded or protected in a foreign state, and quoting approvingly *Oakey v. Bennett*, 11 How. 33, where the court said:

“A statutable conveyance of property cannot strictly operate beyond the local jurisdiction. Any effect which may be given to it beyond this does not depend upon international law, but the principle of comity; and national comity does not require any government to give effect to such assignment, when it shall impair the remedies or lessen the securities of its own citizens. And this is the prevailing doctrine in this country.”

The authorities are collated by the court in this case and many of them are exactly in point on the question involved here; and, while it is true that many of them are cases of involuntary assignment, many of them are cases of voluntary assignment, and voluntary assignments are treated as statutable assignments, and rights under statutable assignments are held to be subject to the rights of local creditors. It would not be beneficial to review all the authorities cited in this and other cases, or in the brief of the respondent, nor yet the authorities cited by the appellants, some of which sustain the doctrine contended for by them. But we think that the great weight of authority, as well as the better reasoning, is in favor of the conclusion that rights under statutable assignments will be protected in a foreign state, subject to the rights of local creditors.

We think, however, notwithstanding the authorities cited by respondent to sustain the action of the court in dismissing the intervenors in the proceedings, that they should be allowed to intervene for the purpose of testing the validity of the claim sued upon. Under the doctrine which we have announced, and under the authorities which sustain the respondent in his main contention, comity extends the aid of the state to foreign creditors, subject only to the

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rights of resident creditors; and under that rule they should have a right to protect the estate against illegal claims, no matter whether fraudulent or not. If the respondent cannot make good his claim under the allegations of his complaint, and it should eventuate that his attachment should be dissolved and judgment would be denied him, the property, under the rule announced above, would be subject to the claim of the assignees. For this reason the judgment must be reversed, and the intervenors allowed to put the respondent upon his trial upon the merits of his claim.

This disposition of the case is not intended to interfere with the rights of any other local creditors, if there be any, who might now or hereafter bring actions against this estate; but we are simply deciding the questions that are presented between the respondent and the foreign assignees of these insolvent debtors.

The cause is reversed, with instructions to proceed in accordance with this opinion.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3637. Decided March 22, 1901.]

WASHINGTON BANK OF WALLA WALLA, *Appellant*, v. G.
HORN, *Respondent*.

DISMISSAL OF ACTION FOR FAILURE TO FILE COMPLAINT — RULES OF COURT — PRESUMPTIONS.

The presumption that the trial court acted regularly and upon sufficient cause, in dismissing an action without prejudice, because of plaintiff's failure to file his complaint, is not overcome by the fact that twenty-four hours' notice was not given plaintiff, as required by a rule of the court, since the court has the right, for good reasons, to suspend its own rules.

Appeal from Superior Court, Whitman County.—Hon. WILLIAM McDONALD, Judge. Affirmed.

R. J. Neergaard (*S. J. Chadwick* and *William J. Bryant*, of counsel), for appellant.

J. F. Fisk, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The appellant had commenced an action in the superior court of Whitman county on September 15, 1898. The summons was served, and on March 16, 1899, defendant answered. On the 29th day of December, 1899, the respondent noticed the cause for hearing on motion for default, and the appellant was served with notice and appeared. The notice was as follows:

“Comes now the defendant G. Horn and moves the court that he have judgment by default in the above entitled action, for the reason that no motion, demurrer or reply was served upon him by the said plaintiff or its attorneys during the time provided by the laws of the state of Washington, and the rules of this court.

(Signed) J. F. Fisk,

Attorney for Defendant G. Horn.”

On the 29th day of December, at the hour of two o'clock p. m., the following entry appears:

“Now on this day this cause coming on to be heard on defendant's motion for default, plaintiff appearing by R. J. Neergaard and the defendant appearing by J. F. Fisk, it appearing to the court that the complaint in this action has never been filed, it is ordered that the complaint be filed immediately. Upon failure to so file his complaint as ordered by the court, it is further ordered that the cause be and the same is hereby dismissed without prejudice.”

To which ruling of the court the plaintiff excepted. It is contended by the appellant that this was an arbitrary action on the part of the court; that he was entitled to twenty-

four hours to file the complaint, under rule 8 of the superior court of Whitman county, which is as follows:

“Should any person refuse or neglect to file any original paper in his possession within twenty-four hours after an order of the court to file the same has been served upon him, the court will hear said cause, disregarding all and any papers not filed and grant such relief as may be proper in the premises.”

And it is insisted by the appellant that he was misled by his reliance upon this rule. But this being a rule of the court, the court, for good reasons, would have a right to suspend it. There is no statement of facts filed in this case, and it does not appear that the appellant asked for further time to file the complaint, or offered any excuse for not complying with the order of the court. In fact, the only showing that there was any offer to file the complaint at all is the following indorsement upon the complaint immediately following the jurat, viz: “Indorsed No. 7595, and with the title of the court and cause and filed in the office of the clerk of the superior court this 30th day of December, 1899, at 11:17 a. m. W. W. Renfrew, Clerk.” In the absence of any showing to the contrary, this court cannot presume that the trial court acted illegally or arbitrarily. But the presumption attaches that the court acted regularly, and that there was sufficient appeared at the time the court made the order dismissing the case to justify his action. If some of the matters which are argued in the brief appeared in the record, a different conclusion might possibly be reached; but, as the record stands, the judgment must be affirmed, and it is so ordered.

REAVIS, C. J., and ANDERS and FULLERTON, JJ., concur.

[No. 3721. Decided March 22, 1901.]

PETER F. SIEVERS *et ux.*, Respondents, v. DALLES, PORT-
LAND & ASTORIA NAVIGATION COMPANY, Appellant.

FOREIGN CORPORATIONS — SERVICE OF SUMMONS — AGENTS WITHIN
THE STATE.

Under Bal. Code, § 4854, which provides that an action against a corporation may be brought in any county where the corporation has an office for the transaction of business, or any person resides upon whom process may be served against the corporation, and Id. § 4875, subd. 9, which provides that if suit be against a foreign corporation doing business within the state, summons may be served on any agent of the corporation, service of process issued out of the superior court of Clarke county upon a purser and a wharfinger in the employ of a foreign corporation is sufficient, where the company was operating a line of steamers on the Columbia river, which, under the charge of the purser, received and discharged freight and passengers at Vancouver, landing regularly at the wharf there for that purpose, and hence making the wharf an office in this state for the transaction of such business.

ADMISSION OF EVIDENCE — HARMLESS ERROR.

Error in permitting the husband to testify that the value of the loss of his wife's services by reason of her sickness occasioned through the act of defendant was \$2,000, instead of requiring the witness to state the facts and circumstances of the injury, for the purpose of allowing the jury to determine the amount, was harmless, where the verdict rendered was for \$600.

NON-SUIT — SUFFICIENCY OF EVIDENCE.

Refusal to grant a non-suit is not error, when there is evidence, though conflicting, sufficient under the allegations of the complaint to sustain the verdict.

EXCESSIVE DAMAGES.

In an action to recover damages against a navigation company for breach of a contract of carriage, and for injuries arising from the negligent and wrongful and forcible landing by defendant of an aged woman at a wrong destination, and the carelessness of defendant's agents in the manner of putting her off upon a barren island, exposed to the inclemency of stormy weather, from which they failed to rescue her but allowed her to make

24	302
126	672
24	302
642	450

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her way home as best she could, which she did after two days' travel, incurring sickness and great bodily discomfort from her exposure, a verdict for \$600 does not indicate passion or prejudice on the part of the jury.

Appeal from Superior Court, Clarke County.—Hon. ABRAHAM L. MILLER, Judge. Affirmed.

Carey & Mays and *Coover & Stapleton*, for appellant.

W. W. McCredie, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—Action for damages for injuries alleged to have been suffered by reason of the appellant, which is a navigation company, failing to carry the respondent Wilhelm Sievers to her destination, and wrongfully putting her off of one of its boats on to an island in the Columbia river, where, through exposure to the elements, she became sick and suffered the damages complained of. Summons was served upon George Woodbury, the purser, and Oscar Johnson, the wharfinger of the company, at Vancouver, as agents of said company. Thereafter defendant appeared and moved to quash the service for the reason that the parties served were not agents of the company within the provisions of the law, and affidavits were filed in relation to the business of the corporation. The motion to quash was overruled and the defendant answered, and the action of the court in overruling the motion to quash the summons is the first error alleged.

We think the motion was properly overruled. Section 4854, Bal. Code, provides that

“An action against a corporation may be brought in any county where the corporation has an office for the transaction of business, or any person resides upon whom process may be served against such corporation, unless otherwise provided in this code.”

The corporation received and discharged freight and passengers at Vancouver, and this business was in charge of the purser, who was certainly one of the company's agents looking after this with other business of the company. The appellant's steamers regularly landed at the wharf in Vancouver, and regularly discharged and received passengers and freight. To that extent it was certainly doing business in the state, and the wharf was an office for the transaction of such business. Paragraph 9 of § 4875, which provides the manner of service of summons, provides that, if the suit be against a foreign corporation or non-resident joint stock company or association doing business within the state, the summons may be served on any agent of the corporation. It does not specify any particular kind of agent, and we think that both the wharfinger and the purser were agents within the meaning of the law.

Upon the trial the verdict was for the plaintiffs in the sum of \$600, for which amount judgment was rendered.

The second allegation is that the court erred in allowing Mr. Sievers, the husband of the respondent, to testify that the loss of Mrs. Sievers' services by reason of her sickness was \$2,000. It is difficult from the record to tell just what was objected to. Certainly, proof of loss of services was admissible under the allegations of the complaint; and while, technically, it would have been more appropriate for the witness to have stated the facts and circumstances of the injury and allowed the jury to determine the ultimate fact of the amount of the injury, an examination of the record shows that the attorney for the respondent was trying to elicit the testimony as to the loss of service as a part of the damages alleged in the complaint, viz., \$1,999, and the answer of the witness, who was a raw foreigner, was not, possibly, entirely responsive to the question. But, in any event, it plainly

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appears that the testimony did not prejudice the defendant, for the verdict of the jury was for only \$600, so that no reversible error occurred in that particular.

It is alleged that the court erred also in not granting defendant's motion for a non-suit upon the termination of plaintiff's testimony. But we think that, under the allegations of the complaint, there was sufficient legal testimony to sustain the verdict. The complaint was simply a statement of the facts, not only a breach of the contract, but neglect and wrongful and forcible landing of the respondent at a wrong destination, and the carelessness of the officers and agents of the appellant in the manner of putting her off and of exposing her to the inclemency of the weather and the dangers of the elements. The testimony is conflicting. If the testimony of respondent is true that she was so put off on Mosquito island with a promise that she should be taken up by another boat of the company on its way down the river, and that the officers of the other boat failed or refused to relieve her, but left her, an aged woman, on a stormy day, unprovided with adequate shelter or fuel, to make her way home as best she could, it was certainly not only neglect, but inhuman treatment, on the part of the appellant. It may have been inconvenient for the appellant to have rescued her from this unfortunate position in which it had placed her; but this will not excuse it, and the jury was warranted from the testimony in concluding that it was not impossible for the appellant, by proper exertion, to have given that care to its passengers which the law imposes upon it. There is direct conflict of the testimony in relation to the opportunity of the respondent to be landed at Cape Horn, as to whether or not she was willing to be landed on Mosquito island where she was landed, and as to whether or not there was a direct promise on the part of the appellant to see

that she was taken from Mosquito island by the steamer City of The Dalles on her downward trip; and the same conflict of testimony is found in relation to the fact of whether or not the respondent was wet by the waters of the river in landing her upon the island. Upon all those questions the jury have passed in favor of the contention of the respondent. Certain it is that this aged woman was compelled, in great distress and fear of mind and with great bodily discomfort, to remain on this island with an old man for nearly five hours; that she was not relieved by the company at all, but, through the ministrations of settlers, finally reached her home, after great hardships, in the course of two days' travel. We do not think that a verdict of \$600 indicates any passion or prejudice on the part of the jury.

We find no error in the instructions of the court, and the instructions asked for by the appellant either had in substance been given by the court, or did not properly state the law.

The judgment is affirmed.

REAVIS, C. J., and ANDERS and FULLERTON, JJ., concur.

[No. 3764. Decided March 22, 1901.]

H. C. WULF, *Respondent*, v. P. J. SULLIVAN, *Appellant*.

NON-SUIT — NEW TRIAL — SUFFICIENCY OF EVIDENCE.

Refusal of the court to grant a non-suit before verdict or a new trial after verdict is not error, when there was sufficient evidence to justify the trial court in submitting the case to the jury, and when there was evidence, though conflicting, sufficient to support the verdict rendered.

Appeal from Superior Court, King County.—Hon. WILLIAM HICKMAN MOORE, Judge. Affirmed.

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Preston & Bell, for appellant.

W. F. Hays, for respondent.

The opinion of the court was delivered by

MOUNT, J.—The plaintiff in this case placed a marine boiler in charge of the defendant to be sold by him. Defendant sold the boiler for \$1,400, a price satisfactory to both, but refused to pay plaintiff any part of the money realized on said sale, claiming that plaintiff had authorized him to put the said boiler in condition for use so that the same might be salable; and that freight charges, labor, and material in fitting up the same for use came to more than the selling price of the boiler. Upon the trial of the cause before the court and a jury, verdict was rendered and judgment entered thereon in favor of plaintiff in the sum of \$750. The only question here is whether the court erred in denying defendant's motion for nonsuit before verdict, and the motion for a new trial after verdict.

It was admitted on the trial that defendant was authorized to sell the boiler for \$1,400; that he should deduct therefrom freight charges, unloading and switching expenses, which amounted to something like \$300, and also a reasonable commission for selling. The only question submitted to the jury, therefore, was whether there was an agreement that defendant should make repairs upon the boiler such as were necessary to make it salable. A special verdict to this effect was requested by defendant, and submitted by the court to the jury. This question was answered in the negative by both the general verdict and the special verdict. The evidence in the case was partly oral and partly written, in the form of letters extending over a period of some two years. There was evidence on the part of the defendant in support of his an-

swer that there was an agreement between the plaintiff and himself that he should repair the boiler, fit it for use so that it might be salable, and that he was to be repaid out of the proceeds of a sale. This evidence was disputed by the plaintiff, and particularly as regards the sale which was finally consummated. Plaintiff testified, in substance, that he did not know the boiler had been repaired at the time of sale, or when the proposition of sale was made to him at the price agreed upon, and that when defendant submitted the proposition of sale for \$1,400 he supposed he would receive that amount less the freight, unloading, and the commissions, and that his share would be at least \$1,000; that defendant had not informed him of any repairs, and that he did not know until after that time that any repairs had been made. There was sufficient evidence, therefore, to justify the court in submitting the case to the jury, and there was evidence to support the verdict rendered. It is not for this court to weigh the evidence, and thereby invade the province of the jury, who are the judges of the facts.

The judgment is affirmed.

[No. 3797. Decided March 22, 1901.]

THEO. H. DAVIES & Co., LIMITED, *Appellant*, v. A. H. SOELBERG *et al.*, *Respondents*.

SHIPPING — BOTTOMRY BOND — COLLATERAL SECURITY — LIABILITY OF OWNER ON LOSS OF VESSEL.

Where the master of a steamship gave a bottomry bond upon a vessel, her cargo and freight, to cover advances made to enable her to pursue her voyage, at the same time drawing a draft upon the owners for the amount of the bottomry bond; and on the day following the execution of the bottomry bond and draft another bond was executed by an attorney in fact of the owners to secure

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said draft, in which it is recited that the consideration therefor is the acceptance by the obligee of a bottomry bond to secure the sum advanced; the three instruments must all be considered as part of one transaction, governed by the rule applicable to the bottomry bonds, whereby the owners' liability is dependent on safe arrival of the vessel in port; and hence, where the vessel was lost, the bond given by the owners to secure the draft included in the bottomry obligation did not create any personal liability against them.

Appeal from Superior Court, King County.—Hon. ORANGE JACOBS, Judge. Affirmed.

Struve, Allen, Hughes & McMicken, for appellant.

Ballinger, Ronald & Battle and *Burke, Shepard & McGilvra*, for respondents.

The opinion of the court was delivered by

MOUNT, J.—The defendants in the year 1898 were operating the vessel "City of Columbia" between Seattle, Washington, and Honolulu, Hawaiian Islands. Arriving at the port of Honolulu in the month of October, 1898, her voyage not being prosperous, the said vessel became embarrassed, and was libeled by plaintiff, and seized by the marshal of the courts of said islands, on account of water, supplies, coal, and other necessary expenses amounting to \$5,686.76. The master, Walter S. Milnor, not being provided with sufficient funds, and not being able to procure the same to relieve the said ship, defendants sent the defendant J. P. Jacobsen, as their agent and attorney in fact, from Seattle to Honolulu, to relieve the said ship from her embarrassment, so that she might leave said port on her return voyage. On the arrival of Jacobsen at Honolulu, he and said master and plaintiff entered into an agreement upon which the ship was released from custody and proceeded on her way. Meeting severe weather, she was thereafter compelled to,

and did, put back to said port, and was thereafter lost and has not yet returned to the port of Seattle. It is admitted by the pleadings that the agreement mentioned resulted in the following contracts, viz.: On October 28, Walter S. Milnor, master of said vessel, executed a bottomry bond as follows:

"To all to whom these presents shall come: I, Walter S. Milnor, Master of the American steamship 'City of Columbia,' now lying in the port of Honolulu, in the Hawaiian Islands, send greeting:

"Whereas, I, said Walter S. Milnor, Master of the aforesaid steamship, now in prosecution of a voyage from Seattle, in the state of Washington, to the ports of Hilo and Honolulu, in the Hawaiian Islands, and return to said port of Seattle, having been detained in said port of Honolulu by attachments issued by the Circuit Court of the First Circuit for said Islands, upon certain libels filed in said court;

"And, whereas, I, as such master, have drawn a bill of exchange of even date with these presents upon A. H. Soelberg of said Seattle, for the sum of Five Thousand six hundred and eighty-six dollars and seventy-six cents (\$5,686.76) in favor of Theo. H. Davies & Company, Limited, a corporation doing business at said Honolulu, which amount of said bill of exchange was at my request advanced and expended by the said Theo. H. Davies & Company, Limited, for the disbursements necessary to be made on account of said steamship for coal, ballast, customs dues, water and other necessary expenditures in order to fit said steamship for sea;

"Now know ye that I, the said Walter S. Milnor, Master of said steamship 'City of Columbia,' for and in consideration of the premises and of one dollar in hand paid, by these presents do bind myself, my heirs, executors, and administrators, and also the owners of said steamship 'City of Columbia' to the just and true payment of said bill of exchange, as well as the said steamship 'City of Columbia,' her boilers, engines, machinery, boats, tackle, apparel and furniture, together with the freight now due,

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and which may become due hereafter to the owner of said steamship for her present voyage, pledging and hypothecating all and singular the same to the said Theo. H. Davies & Company, Limited, their successors and assigns, for the payment in full of the said bill of exchange, according to its terms and tenor.

"The condition of this obligation is such, that if I, the said Walter S. Milnor, Master as aforesaid, or the owner of said steamship, shall well and truly pay or cause to be paid unto the said Theo. H. Davies & Company, Limited, or to their order, the full and just sum of five thousand six hundred and eighty-six dollars and seventy-six cents (\$5,686.76), together with all the charges which shall become due thereupon, at or before the expiration of three days after the arrival of said steamship at said port of Seattle, then this obligation shall be void and of no effect, otherwise to remain in full force and virtue.

"In witness whereof I have hereunto set my hand and seal to three bonds of this tenor and date, one of which being satisfied the others shall be null and void, at Honolulu this 27th day of October, 1898:

(Signed) Walter S. Milnor, (L. S.)

Master S. S. City of Columbia."

At the same time and place said master drew a draft in duplicate upon defendant Soelberg as follows:

"Exchange \$5,686.76.

FIRST.

Honolulu, Oct. 28th, 1898.

Three days after sight of this FIRST
Payable OF EXCHANGE (Second unpaid)
U. S. Gold pay to the order of Messrs. Theo. H. Da-
Coin. vies & Co., Ltd., Fifty-six hundred and
eighty-six 76-100 Dollars, and all charges
for collection, value received, and charge to account of

Walter S. Milnor,

Master S. S. City of Columbia.

To A. H. Soelberg, Esq.,

Scandinavian & American Bank,

No. 36.

Seattle."

On the next day said Jacobsen gave to plaintiff a bond as follows:

"Know all men by these presents that we, Andrew Chilberg, Richard Chilcott, Charles L. Denny and Arabella Amunds, all of Seattle, in the State of Washington, are held and firmly bound unto Theo. H. Davies & Company, Limited, a corporation doing business in Honolulu, Republic of Hawaii, in the sum of Five thousand six hundred and eighty-six dollars and seventy-six cents (\$5,686.76) to the payment whereof, well and truly to be made, we severally bind ourselves, and our respective heirs, executors and administrators, firmly by these presents.

"Witness our hands and seals, at Honolulu aforesaid, this 29th day of October, A. D. 1898.

"The condition of this obligation is such, that whereas at the request of Walter S. Milnor, Master of the steamship 'City of Columbia,' said steamship now being in said port of Honolulu, said Theo. H. Davies & Company, Limited, have advanced and paid certain amounts, to-wit: the sum of Five thousand six hundred and eighty-six dollars and seventy-six cents (\$5,686.76) for necessary disbursements on account of said steamship, in order to enable her to proceed upon her voyage from said port of Honolulu to said port of Seattle, to-wit; for coal, ballast, custom house dues, water and other expenses;

"And whereas the said master of said steamship has drawn his draft upon A. H. Soelberg of Seattle, in said amount of \$5,686.76, payable to the order of said Theo. H. Davies & Company, Limited, in three days after sight;

"Now, if said A. H. Soelberg shall pay, or if we shall pay or cause to be paid said draft, together with interest on the same and all charges connected therewith, within three days after the same shall have been presented at the Scandinavian and American Bank, Seattle, for payment, then this obligation shall be void, otherwise to remain in full force and virtue.

"The consideration of this obligation in addition to that implied by law, is the consent of said Theo. H. Davies & Company, Limited, at our request to permit

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said steamship to proceed to sea without the payment of the amounts advanced as aforesaid, and their acceptance of a bottomry bond upon said vessel to secure said amount in place of the immediate enforcement of their lien.

(Signed) Andrew Chilberg,
Richard Chilcott,
Charles L. Denny,
Arabella Amunds.

By their attorney in fact, John P. Jacobsen."

Plaintiff now brings this action against the defendant personally for the amount of said indebtedness. It is admitted that the said steamship has not arrived at the home port, and that she has been lost at sea. The principal question raised upon this appeal is, did the execution of the bottomry bond obliterate the bill of exchange as a contract to be paid on three days' sight, and also the bond guaranteeing its payment, and merge the said bill of exchange and the bond into a contract contingent for payment upon the safe arrival of the vessel in the home port at Seattle? It is admitted by the pleadings that the bottomry bond above set out was a valid and binding obligation upon the ship. It is also admitted that the bill of exchange above set out was drawn at the time of the execution of said bottomry bond, that the bond known as the Jacobsen bond was executed the next day, and that the execution of all these instruments grew out of one and the same transaction. It is also admitted in the argument before this court that a bottomry bond is not an undertaking that the money shall be paid *in all events*, but a loan where the lender trusts the vessel and her cargo alone, and is not to be repaid unless the vessel returns to port; that the borrower does not become responsible unless the vessel survives. It is argued, however, that the plaintiff was not satisfied to rely upon the bottomry bond

alone, and that the Jacobsen bond was taken as additional security. No authority is called to our attention where the lender may take a valid bottomry bond, and at the same time take other security which, after loss of the vessel, will be available in any event. The reasons for a bottomry bond and the authorities we have examined seem to be opposed to this doctrine.

In order to construe the contract and to determine this question correctly, it is necessary to have a clear understanding of a bottomry obligation and its effect. Conkling, in his work on Admiralty, at page 194, defines a bottomry bond as follows:

"It is a contract in the nature of a mortgage pledging the ship (or *bottom*); or the ship and freight; or the ship, freight and cargo; as a security for the repayment of money loaned. Its conditions are, that if the voyage is performed in safety, the sum loaned, together with the stipulated interest, shall be paid, either upon the completion of the voyage, or at the expiration of some specified period; but that if the subject of the pledge is lost by a peril of the sea, the lender shall lose his money also."

See, also, 2 Blackstone, 457, and 3 Kent's Commentaries, 354. Chancellor KENT, *supra*, says:

"The condition of the loan is the safe arrival of the subject hypothecated, and the entire principal as well as interest is at the risk of the lender during the voyage. The money is loaned to the borrower, upon condition that if the subject pledged be lost, by a peril of the sea, the lender shall not be repaid, except to the extent of what remains; and if the subject arrives safe, or if it shall not have been injured except by its own defect, or the fault of the master or mariners, the borrower must return the sum borrowed, together with the maritime interest agreed on, and for the repayment, the person of the borrower is bound, as well as the property pledged."

It will be seen by these definitions that, if the vessel is lost, there is no obligation to repay, but, if she arrives

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safely, the obligation has matured, and both the vessel and the owners are bound. It is also said by Conkling, *supra*, page 211:

"It is not unusual for the master, at the time of executing a bottomry bond, also to give to the lender bills of exchange on the owner for the sum borrowed; a stipulation being inserted in the bond, that if the bills are paid, ~~the bond shall~~ be void; and this does not affect the validity of the bond, if ~~in fact~~ the lender relied on it mainly for security, and would not ~~have~~ advanced his money without it."

It is conceded in this case that the bond dated October 27th was a *bottomry bond*, and was given by the master of the vessel from necessity, both on account of repairs and supplies, in order that she might prosecute her voyage, and on account of inability to procure the required funds in any other way. It was also given by consent of the owners. Mr. Justice THOMPSON, in the case of *The Mary*, 1 Paine, 671 (16 Fed. Cas. No. 9,187), says:

"The essential difference between a bottomry bond and a simple loan is, that in the latter the money is at the risk of the borrower, and must be paid at all events; in the former, it is at the risk of the lender during the voyage, and the right to demand payment depends on the safe arrival of the vessel."

When, therefore, the lender takes a bottomry bond, he is to the extent of his loan an insurer of the safe arrival of the vessel, and may exact any amount of interest agreed upon, and not fall within the provisions of the usury laws. 2 Blackstone, Commentaries, 457; Conkling's U. S. Admiralty, 195.

The validity of a bottomry bond given by the master of a vessel depends upon necessity, and one of the necessities is that the money cannot be obtained in any other way. 3 Kent, Commentaries, 359; *The Aurora*, 1 Wheat. 96;

Sloan v. The A. E. I., 22 Fed. Cas. No. 12,946; *Rucher v. Conyngham*, 20 Fed. Cas. No. 12,106. In this latter case the court says:

“I add to these positions, as a corollary, that an hypothecation bond must not be diverted from its original and sacred use, to the purpose of securing engagements, not at first founded merely on the credit of the ship, but for advances made on the personal credit of the owners, either voluntarily, by their consignee, agent or friend, or at their request; nor, of course, can it be given as a double security, running along with, and in aid of, a personal responsibility. The one excludes the other, and they cannot exist together.”

The bond in this case was given by the master, and a draft for the amount payable at three days' sight given at the same time. Both of these instruments were given by consent of the owners, represented by Jacobsen, their attorney in fact. On the next day the owners, by Jacobsen, their said attorney in fact, executed a bond guaranteeing the payment of this draft. As we have already seen, the draft did not mature until the safe arrival of the vessel. 2 Blackstone, *supra*; 3 Kent, *supra*.

If the bottomry bond was a valid obligation at the time it was given, and the plaintiff relied upon it and accepted the same as security for the advancement, then there was no consideration for the subsequent undertaking. We are of the opinion, however, taking all the agreements into consideration, that the subsequent bond was a part of the single transaction, and that plaintiff not being content to rely upon the bottomry bond alone, but desiring other security, this Jacobsen bond was given, not for the purpose of taking away the security contained in the bottomry obligation, or to destroy the effect of it, or in any way change it, but to aid and run along with it, all the obligations depending upon the same contingency, viz.,

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the safe arrival of the vessel. This view harmonizes all the instruments and, in our opinion, is clearly expressed in the bond as follows:

"The consideration of this obligation in addition to that implied by law is the consent of said Theo. H. Davies & Company, Limited, at our request, to permit said steamship to proceed to sea without the payment of the amounts advanced as aforesaid and their acceptance of a bottomry bond upon said vessel to secure said amount in place of the immediate enforcement of their loan."

Both this and the bottomry bond were security for the payment of the draft *drawn by the master*. Both this bond and the draft were dependent upon the safe arrival of the vessel at her home port. If this bond had been intended to take the place of the bottomry bond, something should, and undoubtedly would, have been stated in it to that effect. On the other hand, it is distinctly stated that a part of the consideration for his later bond was the acceptance by plaintiff of a *bottomry bond*. The bottomry bond was security for the same draft as this one was. Under the terms of the bottomry bond, the draft did not mature until after the safe arrival of the vessel. *The Hunter*, 12 Fed. Cas. No. 6,904; *Greeley v. Smith*, 10 Fed. Cas. No. 5,750; *Maitland v. The Atlantic*, 16 Fed. Cas. No. 8,980.

If the draft depended upon the bottomry bond, and the bottomry bond upon the safe arrival of the vessel, it is clear that the subsequent bond, being additional security for the payment of the draft, did not mature until the draft became an obligation on the owner. This bond was not given to secure a *debt*, but was an obligation to pay the draft recited in it, and does not purport to do more. The parties to this action made their contract. They might have made the payment of the money contingent upon the safe arrival of the vessel, or they might

have drawn a draft solely upon the credit of the owners. They might have made a contract by which part of the money should be upon credit of the vessel and part of it upon credit of the owners. They chose to make it all contingent upon the safe arrival of the vessel and are bound by their contract.

Appellant argues that, since the contract did not provide for marine interest, it was such a contract as might be secured by some agreement which could be enforced in any event. This contention is probably correct. But the question here is, what was the effect in law of the contract entered into? It is true that plaintiff has alleged an oral contract entered into prior to the execution of the draft and bonds. But this contract is merged in these written instruments, and these instruments must speak the terms of the agreement, and plaintiff cannot escape the condition imposed by the agreement by these contracts taken all together as one. *Gordon v. Parke & Lacey Machinery Co.*, 10 Wash. 18 (38 Pac. 755); *Myers v. Munson*, 65 Iowa, 423 (21 N. W. 759); *Looney v. Rankin*, 15 Ore. 617 (16 Pac. 660).

If the vessel had reached port she would be liable for the payment of the draft, because the draft would have then become due; and the owners could not escape payment of the draft even if the vessel and freight were not sufficient for that purpose. But, until the draft becomes an obligation against the owners, the bond cannot be enforced, because it is conditioned for its payment only, and not for the debt. If, as is contended by appellant, the Jacobsen bond is security for the payment of the draft in any event, and an additional security therefor does not avoid the bottomry bond, and this principle is made to apply in all cases, then the lender of money upon bottomry may also secure himself in this way, and avoid

usurious obligations and the maritime risk of insurance of which the latter is one of the essentials of bottomry obligations. He can rely upon his bottomry bond upon the safe arrival of the vessel, and upon the personal responsibility of the owners in case of the loss of the vessel by perils of the sea, and thus no loan would be insecure, no matter how usurious. It is true no interest is provided for in the present case except "lawful interest and all charges connected therewith," but interest may have been calculated in advance, and included in the draft. In any event, the bottomry bond was given in this case, and it is conceded to be a valid obligation. It is held in *Force v. The Ship Pride of the Ocean*, 3 Fed. 162, that an agreement for maritime interest is not necessary to the contract, and in *The Mary*, 16 Fed. Cas., No. 9187, that where no rate of interest is expressed in the bond, "it is perhaps reasonable to conclude that the marine interest was included with the advance, and inserted in the bond as principal." The loan here must either be at the risk of the lender, in which event his payment depends upon the safe arrival of the vessel, or it must be at the risk of the borrower, in which event it is a simple loan, and the bottomry obligation void; for "the bottomry bond cannot be made to cover advances made upon the personal security of the borrower, and not upon the exclusive security of the ship; but taking bills of exchange at the same time, by way of collateral security, does not exclude the bottomry bond, nor diminish its solidity," 3 Kent, 359. *The Hunter*, 1 Ware, 251 (12 Fed. Cas. No. 6,904; *Rucher v. Conyngham*, *supra*; *Sloan v. The A. E. I.*, *supra*; *The Aurora*, *supra*; *Bray v. Bates*, 9 Metc. (Mass.) 237; *Thorndike v. Stone*, 11 Pick. 183.

Under the circumstances here pleaded and admitted and the rules above stated, the bottomry obligation was not

void, and the loan must therefore have been at the risk of the lender. It could not have been at the risk of both, for if it were at the risk of the owners, it was not at the risk of the lender. It may be asked what was the profit of taking the Jacobsen bond if the bottomry bond was sufficient? An answer to this would be that in case of the safe arrival of the vessel at her home port the owners would be personally liable under this bond, and, the vessel failing to pay the draft, the defendants would be bound personally; or, if the bottomry bond should fail *on any account*, and the vessel should arrive safely at her home port, the lender would still have a binding written obligation against the owners. But it is enough to say that this court has no concern about the reasons for a contract except as the same may be considered in order to arrive at a proper construction thereof. We therefore conclude that the bottomry bond in this case was the principal obligation; that the bill of exchange and Jacobsen bond were collateral securities thereto, and all contingent upon the safe arrival of the vessel at her home port. In arriving at this conclusion we regard the instruments above named as containing the contract; that all were one transaction. Holding as we do upon this question, it is unnecessary to determine the other questions discussed in the briefs.

The judgment of the lower court must be affirmed.

REAVIS, C. J., and DUNBAR and FULLERTON, JJ., concur.

[No. 3408. Decided March 28, 1901.]

24	321
423	163
24	321
432	240

WASHINGTON NATIONAL BUILDING, LOAN & INVESTMENT ASSOCIATION, *Appellant*, v. JAMES C. SAUNDERS, *Defendant*, D. F. TOZIER, *Respondent*.

DISMISSAL OF ACTION — RIGHT WHEN AFFIRMATIVE RELIEF DEMANDED IN ANSWER.

Under the code procedure, whether the action be of legal or equitable cognizance, the plaintiff has no right to dismiss his action, when a counterclaim has been set up and affirmative relief demanded by the defendant. (*Waite v. Wingate*, 4 Wash. 324, overruled as to this point.)

SAME — FORECLOSURE OF PLEDGE — TRIAL OF PARAMOUNT TITLE.

In an action to foreclose a pledge of shares of stock, the fact that defendant's answer sets up a claim of paramount title to the shares of stock in controversy, affords plaintiff no right to demand a dismissal of his action, on the ground of being privileged to elect not to try title in such action.

(*California Safe Deposit and Trust Co. v. Cheney Electric Light, etc., Co.*, 12 Wash. 138, limited to mortgage foreclosure suits).

APPEAL — HARMLESS ERROR — SUSTAINING DEMURRER TO PLEADING.

Error of the court, if any, in sustaining a demurrer to a reply, is cured by the subsequent admission of testimony in support of the allegations contained in the reply.

Appeal from Superior Court, Jefferson County.—Hon. JAMES G. McCLINTON, Judge. Affirmed.

Strudwick & Peters, for appellant.

A. R. Colman, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—Plaintiff is a domestic building and loan association, with its principal place of business at Seattle. In June, 1898, defendant Saunders requested a loan of plaintiff, and offered as security a certificate of ten

shares of plaintiff's stock. On this security plaintiff loaned Saunders \$800, taking his note for re-payment of the money in three months, with interest at ten per cent. per annum, and received in pledge the certificate of stock. The shares of stock were the property of defendant and respondent, Tozier, and, at the time of the delivery to plaintiff by Saunders, apparently bore the signature of the defendant Tozier to a blank indorsement thereon, and Saunders informed plaintiff that Tozier had given him the certificate to use for the purposes of the loan and for Saunders' use. On default in payment of the note, plaintiff brought suit against Saunders and Tozier to foreclose the pledge of the shares of stock against Saunders, and against any interest which Tozier might have in it, and for personal judgment against Saunders. Saunders appeared by demurrer, and Tozier answered separately. The allegation of the complaint is that Tozier claimed some interest in and to the certificate of shares of stock, but plaintiff avers such claim is subsequent and subject to its claim. The answer of Tozier denies the pledge of the stock by Saunders, and denies that his interest in the stock is subsequent or subject to the claim of plaintiff, or that plaintiff has any claim or interest whatever in the stock. The answer also affirmatively sets out that Tozier was at all times since the issuance of the stock the owner thereof, and denies that he ever assigned, transferred, delivered, or pledged the stock to plaintiff or to any one else, or that he authorized any assignment, transfer, delivery, or pledge of the stock to plaintiff or any one else, and demands judgment against plaintiff for the possession of the stock; or, if possession cannot be had, judgment is demanded for the value thereof, averred to be \$1,000. The affirmative allegations are also pleaded as a counter-claim to plaintiff's cause of action. When the answer of the de-

defendant Tozier was filed, plaintiff moved to dismiss the action as against defendant Tozier on two grounds: (1) that the action is equitable and may be dismissed at any time before decree at plaintiff's election; (2) that it appears in defendant's answer that he claims a paramount and adverse title to the pledgee in the subject matter of the controversy, and that the same cannot be litigated herein. The court overruled the motion to dismiss, and plaintiff filed its reply to the counter-claim of defendant Tozier, admitting that defendant was at one time the owner of the shares of stock, but denying every other allegation of the answer, and affirmatively alleging that prior to the 30th of June, 1898, defendant Saunders was president of a state banking corporation and heavily interested as a stockholder; that the bank was then in charge of a receiver and in course of liquidation; that Saunders was desirous to have the receiver discharged, and reopen the bank and establish its credit, and applied to defendant Tozier to assist him with moneys and securities to place among the assets of the bank, to exhibit to the court who appointed the receiver so as to secure the discharge of the receivership; that defendant Tozier, desiring to assist Saunders in the reopening of the bank, delivered to him the certificate of stock, the subject of controversy herein, and certain other securities for the purpose of enabling the bank to reopen; that the court, upon the exhibition of the securities delivered to Saunders, was induced to discharge the receiver, and that the money received by Saunders from plaintiff was used as part of the apparent assets of the bank. A demurrer was filed to the affirmative matter in reply, and sustained, to which plaintiff excepted. The case then proceeded to trial. Testimony was produced by both plaintiff and defendant Tozier. The superior court found that the ten shares of stock were originally issued

by plaintiff to defendant Tozier, and ever since have stood, and are now standing upon the books of the plaintiff in the name of Tozier; that the representation made to plaintiff by Saunders of authority to pledge the same was false; that the purported indorsement of the stock was not the signature of Tozier, was not made by his consent, knowledge, or authority, and that the indorsement was in truth and fact a forgery; that Tozier did not know that such indorsement had been made until long after the stock was delivered to plaintiff; that plaintiff made the loan to defendant Saunders in good faith, and believed the indorsement thereof to be genuine; that Tozier was, at all times mentioned in the complaint, the owner and entitled to the possession of the shares of stock; that Tozier, in delivering possession of the stock to Saunders, did so without the intention of enabling or assisting Saunders to perpetrate any fraud on the court; and judgment was entered upon the findings against plaintiff in favor of respondent, Tozier.

1. Appellant urges here error in refusing plaintiff's motion to dismiss the cause at its cost, based upon the ground that it was an equitable action and could be dismissed at plaintiff's election. The rule urged is that plaintiff in an equitable action may, at any time before judgment, dismiss the cause; that the cross bill depends upon the original bill, and that, until final judgment, the right to dismiss the action remains with the plaintiff. Two decisions of this court are cited to maintain this rule; the first case is *Somerville v. Johnson*, 3 Wash. 140 (28 Pac. 373), which was a suit to quiet title. The defendants entered a denial to the allegations of the complaint, but did not pray for affirmative relief. It was observed by the court:

"We had no statutory provision regulating the right of

dismissal in equitable actions by the voluntary act of the party when this cause was tried, and therefore the right existed as at the common law, unless it was taken away by the above sections [our statute]. . . . It cannot be supposed that such effect was intended, and we think that the right to dismiss an action like the present one is not affected by those sections, and that we must look to the common law for the rule in such cases, which allows the complainant at any time before final decree, upon payment of costs, to dismiss his bill."

It will be noted in the above decision that there was no affirmative defense or counterclaim in issue. The other authority from this court is *Waite v. Wingate*, 4 Wash. 324 (30 Pac. 81). This was also an action to quiet title. The answer contained denials of some of the material allegations of the complaint, and also affirmative defenses, which defendants denominated a counterclaim, and in which title was set up in themselves. The prayer of the answer was that defendants be adjudged the owners of the premises, and that plaintiffs had no interest therein. No reply was filed to the affirmative matters set out in the answer. At this point, and upon request of plaintiffs, the action was dismissed, against the contention of defendant. The court observed, in disposing of the case:

"As to the error alleged, which is grounded upon the court's allowing the plaintiffs to dismiss their action, we have decided in the case of *Somerville v. Johnson*, 3 Wash. 140, that § 409 of the Code of Procedure (which was § 286 of the Code of 1881), relating to non-suits, does not apply to equitable actions, and that, as we have no statutory provisions regulating the right of dismissal in equitable actions by the voluntary act of the party, the right exists as at the common law, which allows the complainant at any time before final decree, upon the payment of costs, to dismiss his bill. It is a rule of the common law that the original bill and the cross bill, where one is filed as a defense thereto, constitute but one suit,

even though affirmative relief be asked in the cross bill; that the whole constitutes but one cause, and a dismissal of the original bill carries the cross bill with it. See *Elderkin v. Fitch*, 2 Ind. 90; *McGuire v. Circuit Judge*, 69 Mich. 593 (37 N. W. 568)."

It may be observed that, of the authorities cited in the opinion, *Elderkin v. Fitch* seems to support the announcement. The Indiana court observed:

"So, we think, in the practice in chancery under our statute, R. S. p. 848, where the answer to the original bill is used as a cross-bill also, in cases requiring such a bill, the two together make but one suit; and hence the dismissal of the original bill must carry with it, out of court, the appendage."

The facts as stated in that case show that it was a bill in chancery for the foreclosure of a mortgage, and one of the defendants, in his answer to the original bill, filed a cross-bill against his co-defendants and the plaintiff in the original bill, and the plaintiff was then allowed to dismiss his original bill. The court observes generally:

"A plaintiff in chancery has a right to dismiss his bill at his pleasure, before final hearing, upon payment of costs, if he is not in contempt."

The other case mentioned, *McGuire v. Circuit Judge*, was also an action to quiet title where the plaintiff in possession of real estate brought the action, and it was adjudged that a cross-bill would not lie on the part of the defendant for the purpose of obtaining possession, which was the proper object of an action of ejectment. The court observed:

"Where relief is sought by cross-bill, the relief prayed for must be equitable relief. . . . In our practice a cross-bill is considered as a mere dependence upon the original bill, and, when the matter set up is simply a matter of defense, it is disposed of by a dismissal of the original bill."

Evidently, under the Michigan rule, a legal counterclaim could not be interposed in an equitable action. It seems from an examination of the authorities that some expressions indicate there was a period in the course of equity jurisprudence when the defendant could make only a defensive answer to the original bill. There was to only a limited degree any set-off, and this seems to have been confined to matters set forth in the original bill. There was, of course, no recognition of a counterclaim, and the rule was then stated that the complainant could dismiss the original bill at any time before decree, and that such dismissal carried with it the answer or cross-bill. But it does not seem, when the cross-bill was authorized to set up matters for affirmative relief, that the right of dismissal at pleasure, even before decree, absolutely existed. Story, Equity Pleading (9th ed.), § 399, states the distinction as follows:

“A distinction should be drawn between cross-bills which seek affirmative relief * * * and cross-bills which are filed simply as a means of defense, since there are rules applicable to one class which do not apply to the other. Thus a dismissal of the original bill carries the cross-bill with it when the latter seeks relief by way of defense; but it is otherwise, and relief may still be given upon the cross-bill, where affirmative relief is sought thereby.”

2 Barbour's Chancery Practice, 128, declares:

“The connection of the matter of a cross-bill, be it *per se* legal or equitable, with the subject matter of the original bill, gives the court jurisdiction of the cross-bill, of which it cannot be ousted by a dismission of the original bill.”

It is well to examine the rule in the federal courts, as the distinction in the forms of action and procedure between law and equity is more carefully observed there than in

most of the state courts. *Holgate v. Eaton*, 116 U. S. 33 (6 Sup. Ct. 224), was a cause the supreme court reversed with directions to dismiss the original bill and proceed to final decree on the cross bill. In *Chicago & A. R. R. Co. v. Union Rolling Mill Co.*, 109 U. S. 702 (3 Sup. Ct. 594), there is an elaborate consideration of the rule, and the court observed:

"The appellants contend that Dumont, the original complainant, had the right at any stage of the case to dismiss his bill, and that its dismissal would carry with it the cross-bill, and that having made the motion to dismiss, which was erroneously overruled, all the subsequent proceedings and decrees are erroneous. It may be conceded that when the original bill is dismissed before final hearing, a cross-bill filed by a defendant falls with it. It may also be conceded that, as a general rule, a complainant in an original bill has the right at any time, upon payment of costs, to dismiss his bill. But this latter rule is subject to a distinct and well settled exception, * * *

Again, in *Pullman's Car Co. v. Central Transportation Co.*, 171 U. S. 138 (18 Sup. Ct. 808), it was observed:

"The Pullman Company, complainant in the original suit, insists that it had the right to discontinue that suit at its own costs before any decree was obtained therein, and the refusal of the court below to grant an order of discontinuance upon its application is the first ground of objection to the decree herein. The general proposition is true that a complainant in an equity suit may dismiss his bill at any time before the hearing, but to this general proposition there are some well recognized exceptions. Leave to dismiss a bill is not granted where, beyond the incidental annoyance of a second litigation upon the subject-matter, such action would be manifestly prejudicial to the defendant. The subject is treated of in *Detroit v. Detroit City Railway Company*, in an opinion by the circuit judge, and reported in 55 Fed. Rep. 569, where many of the authorities are collected, and the rule is stated substantially as above. The rule is also referred to

in *Chicago & Alton Railroad v. Union Rolling Mill Co.*, 109 U. S. 702."

In the 55th Federal, *supra*, the circuit court observed:

"The motion to dismiss presents a question of equity practice which is not as clearly settled as could be desired. It seems hardly fair that after a case has been got ready for hearing and the defendant has gone to the expense of a full preparation, the complainant may deprive the defendant of all that preparation by a dismissal, under which he reserves full power to harass him by bringing a new bill when he shall choose to do so, on the simple condition that he pay the costs, which are so notoriously inadequate to compensate defendant for his actual expenditures."

See, also, *Markell v. Kasson*, 31 Fed. 104.

It may be observed that the dismissal of the original bill after the cross bill is filed, claiming affirmative relief, as viewed by the federal courts, seems to be subject to judicial discretion. But we think, under the code procedure existing here, there is no absolute right of dismissal after issue joined, where a counterclaim is set out and affirmative relief demanded by the defendant. There is but one form of action in our procedure. Bal. Code, § 4793. The forms of pleading existing in civil actions inconsistent with the code are abolished. § 4903. Section 4913a provides:

"The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have heretofore been denominated legal or equitable, or both."

In those states where the code procedure prevails, the trial of the action, whether commenced in equity or at law, and whether the counterclaim be legal or equitable, seems to be uniform, and there is no distinction between the principles controlling the dismissal of the action,

whether it be denominated legal or equitable. *Mott v. Mott*, 82 Cal. 413 (22 Pac. 1140); *Warner v. Darrow*, 91 Cal. 309 (27 Pac. 737); *Maffett v. Thompson*, 32 Ore. 546 (52 Pac. 565).

The last case contains a well-considered review of the authorities. It is concluded that the rule announced in *Waite v. Wingate*, *supra*, is not in consonance with the spirit of the code nor in accord with the better authorities. There was no legal error in the court's refusal to dismiss the action.

2. It is further urged by counsel for appellant that the answer sets up the claim of paramount title to the certificate of stock in controversy, and that such title cannot be litigated in this action. In support of this contention, *California Safe Deposit & Trust Co. v. Cheney Electric Light, etc., Co.*, 12 Wash. 138 (40 Pac. 732), is cited. That was an action to foreclose a mortgage, and the defendant set up a paramount and adverse title to the property the subject of the mortgage. It was determined that such claim could not be litigated in a foreclosure suit. The subject of the controversy here is a pledge—a certificate of stock—in the possession of the plaintiff. In the case of a mortgage the possession is usually in the mortgagor. A pledge as this is not attended with all the incidents and is not in fact a mortgage, such as is created by our statute. The pledgee may, according to the best authorities, by proper notice to the pledgor, sell the pledge for the satisfaction of any lien he has upon it. He may, however, proceed to a judicial foreclosure and submit the pledge for the adjustment of all conflicting claims. In the case of *Pullman's Car Co. v. Central Transportation Co.*, 171 U. S. 138 (18 Sup. Ct. 808), the court observed, with reference to the dismissal of a bill in equity because the cross complaint claimed a return of personal property in

the ~~possession~~ of the complainant among other demands for relief:

“Whatever may be the original character of the liability of the Pullman Company to return or make compensation for the property, we are of opinion that under the facts above set forth it cannot object to the filing of the cross-bill, or to the determination of the amount of its liability by a court of equity. It had itself voluntarily appealed to the jurisdiction of such a court for the purpose of obtaining its aid in decreeing the terms upon which its obligations to the Central Company might be fulfilled and the lease terminated, either under the eighth clause in the lease or because of its invalidity as being *ultra vires*. Having thus appealed to equity for its aid and the lease having been conclusively determined to have been void, we think it was within the fair discretion of the court to retain jurisdiction of the cause and of the original complainant, and to permit the filing of a cross-bill in which the cross-complainant might seek affirmative relief, * * *.”

In this case the plaintiff in possession of the certificate of stock voluntarily brought it and the defendant into court. The defendant denied the superiority of any claim plaintiff had to the certificate, and affirmatively claimed that he was entitled to it. It would seem inconsistent with our liberal practice to dismiss the action, and then allow the same relief upon the commencement of another action in different form. It is not assumed that there is any lack of jurisdiction in the court to determine the controversy in its present form, but the objection is solely upon the ground that the plaintiff may elect not to try it. We do not desire to extend the rule announced in *California Safe Deposit & Trust Co. v. Cheney Electric Light, etc., Co.*, *supra*, to the foreclosure of pledges such as this.

The exception to the demurrer to the reply, even if well taken, did not injure plaintiff, in view of the testimony

subsequently admitted at the trial. Also, see *Thorp v. Smith*, 18 Wash. 277 (51 Pac. 381).

We have examined the testimony, and find some substantial conflict, but are not inclined to disturb the findings of the superior court.

The judgment is affirmed.

DUNBAR, FULLERTON, ANDERS and WHITE, JJ., concur.

[No. 3666. Decided March 28, 1901.]

THE STATE OF WASHINGTON, *Respondent*, v. WALTER
RASCH *et al.*, *Appellants*.

INFANTS — VAGRANCY — COMMITMENT TO REFORM SCHOOL — SUFFICIENCY OF EVIDENCE .

The commitment of boys between the ages of eight and fifteen years to the reform school on the ground of vagrancy, under Bal. Code, § 2724, is unwarranted, when there was no testimony before the court showing they were guilty of vagrancy, or mendicancy, or incorrigibility, or had been convicted of crime, and the testimony introduced showed merely that the house in which they lived was very dirty, the mother being dead and the father away at work most of the day; that the boys were not clothed as well as some other boys in the community, but that they had plenty to eat; that on one occasion they had, with some other boys, broken into a house in the neighborhood, but there was nothing in the testimony showing how long before; and when the testimony in their behalf showed that they attended school regularly, were not of quarrelsome dispositions, and were regarded by some of the witnesses as good boys.

Appeal from Superior Court, Lincoln County.—Hon. CHARLES H. NEAL, Judge. Reversed.

E. A. Hesseltine, Wright & Wright and Martin & Grant, for appellants.

Mar. 1901.] Opinion of the Court—DUNBAR, J.

N. T. Caton, Prosecuting Attorney, *R. K. McComb*, of counsel), for the State.

The opinion of the court was delivered by

DUNBAR, J.—This is an appeal from the superior court of Lincoln county from a judgment committing the appellants to the reform school. A complaint was made to a justice of the peace in Lincoln county, under § 2722, Bal. Code, which provides that when a boy or girl of sound mind, between the ages of eight and sixteen years, shall be convicted before a justice of the peace or other inferior court of any crime, medicancy, vagrancy or incorrigibility, it shall be the duty of said magistrate before whom he or she may be convicted to forthwith send such boy or girl, together with all the papers filed in his office upon the subject, under the control of some officer, to a judge of a court of record. This was done in the present case, and the judge of the superior court, under the provisions of § 2724, entered into an examination of the cause, and committed the appellants to the reform school.

There are some questions of practice raised by the appellants, but it is not necessary for us to pass upon them, as an examination of the statement of facts convinces us that there was not sufficient testimony to warrant the court in making the commitment which it did. There is no doubt that the law has relegated a great deal to the discretion of the trial court in actions of this kind, and we would not be inclined to weigh the testimony, or enter into too nice a discrimination for the purpose of overruling the judgment of the trial court; but the defendants have a right of appeal to this court and the law does not intend that the appeal shall be an idle effort. Conceding the truthfulness of all the testimony offered by the state, we do not think it was legally sufficient to warrant the conviction. These boys

were from eight to fifteen years old. There was no testimony adduced before the court showing that they were guilty of vagrancy, or mendicancy, or incorrigibility, or that they had been convicted of any crime. The extent of the testimony was that the house in which the boys lived was very dirty; that the boys were not clothed as well as some other boys in the community; that on one occasion they had, with some other boys, broken into a house in the neighborhood. This last fact, however, appeared only incidentally, and it does not appear from the testimony how long ago it was; it may have been years ago, so far as we are able to gather from the record. But the principal testimony was directed to the untidy condition of the house. Even the witnesses for the state testified that the boys were good-natured, that they attended to their own business, that they did not quarrel among themselves or with other boys; and the testimony of a great many witnesses was to the effect that they were good boys, that they had plenty to eat and plenty to wear; that they attended school regularly, and that no complaints had been heard of them before that time. It does not appear that any citizen of the community had been annoyed by them in any way, or had made any complaints concerning them. So far as their appearance is concerned, it is worthy of mention that the sheriff had taken into custody a neighbor's boy, mistaking him for one of the defendants. A deliveryman testified that he delivered goods at the house of the father of these boys nearly every day, that they bought and used a great deal of provisions, and that they seemed to have as much to eat as other people in the community. A neighbor living within a few feet of the house testified to the same effect; that he had frequently observed their table, and had eaten there and that they had good provisions; that the boys were quiet, good-natured and obedient to their parent.

The father, who earnestly resisted this commitment, testified that his wife had died seven years before; that he had done all he could to properly raise his children; that he had worked steadily at good wages ever since his wife died; that for three years prior to this action he had worked, without missing a day, for \$50 a month; that \$40 of his wages invariably went to the support and maintenance of the children; that he had to leave them to themselves to a certain extent; and that more or less disorder and confusion resulted, but that he kept them as well clothed, and probably better fed, than the ordinary run of poor people in the community. This, in fact, was the burden of the testimony in the case, outside of that of the officers of the law who testified as to the untidy and uncleanly condition of the house.

The law will not undertake to stand *in loco parentis* to all the children in the state who do not have the best, or even ordinary, advantages. Parental and filial affection are too deeply rooted to be disturbed on slight provocation, and home life is too sacred to be violated, even by the law, without most pressing cause. The tendrils of affection are implanted equally in the breast of pauper and prince. They put forth as luxuriantly, blossom with as sweet a fragrance, and bear as beautiful fruit in the hovel as in the palace. The law, in its policy, will not rush to the support of every standard of morality or thrift that the citizen sees fit to erect. Great latitude must necessarily be given in these respects. It is no slight thing to deprive a parent of the care, custody, and society of a child, or a child of the protection, guidance, and affection of the parent. If these children can legally be taken from the custody of their parent under the conditions shown by the record in this case, few parents in poor circumstances, especially if their children are unfortunate enough to lose

either father or mother, would have any assurance that the care and custody of their children would be left to them. A great deal is said by the state's attorney in his brief in relation to crimes that had been committed by these children. But these assertions are absolutely outside of the record, and cannot be regarded, of course, by this court, which passes alone upon questions that are matters of record.

The judgment must be reversed, and the cause remanded, with instructions to discharge the appellants from custody.

REAVIS, C. J., and FULLERTON, ANDERS and WHITE, JJ., concur.

[No. 3697. Decided March 28, 1901.]

FREDERICK TAYLOR, *Appellant*, v. LESLIE W. GALE, *as Administratrix, Respondent*.

RES JUDICITA — LAW OF CASE — QUESTIONS RAISED ON APPEAL.

In an action to establish a claim which had been rejected by an administratrix, where, upon an appeal by plaintiff, the defendant had made the point, and fully argued it, that a grant of a new trial would be a useless thing for the reason that the claim had not been fully verified, it will be presumed on a second trial, from the fact that the supreme court granted a new trial, that the supreme court had under consideration the question of verification, although not passing directly thereon, and that the sufficiency of the verification was established as the law of the case.

Appeal from Superior Court, King County.—Hon. ORANGE JACOBS, Judge. Reversed.

Arthur E. Griffin and Stratton & Powell, for appellant:

This court would certainly not order a new trial, unless it found there was something to try. But there was not

Mar. 1901.] Opinion of the Court—DUNBAR, J.

and could not be anything to try, if the claim which is the foundation of this suit had not been properly verified and presented. *Edmonston v. McLoud*, 16 N. Y. 543; *Bernhard v. Reeves*, 6 Wash. 424.

It is a familiar rule that a former decision in the same cause is final, not only as to all points raised, but as to all which might have been raised. *Wilkes v. Davies*, 8 Wash. 112 (23 L. R. A. 103); *Stallcup v. Tacoma*, 13 Wash. 146 (52 Am. St. Rep. 25); *State ex rel. Holgate v. Superior Court*, 19 Wash. 116; *Traders' National Bank v. Schorr*, 20 Wash. 1 (72 Am. St. Rep. 17). This doctrine has been recognized and applied by the court in a great variety of other cases. *State ex rel. Abernethy v. Moss*, 13 Wash. 44; *Dennis v. Kass*, 13 Wash. 137 (48 Am. St. Rep. 880); *Furth v. Snell*, 13 Wash. 664; *Smith v. Seattle*, 20 Wash. 614; *O. R. & N. Co. v. Dacres*, 1 Wash. 199; *Taake v. Seattle*, 18 Wash. 178.

It is claimed by defendant that, as she was respondent on the former appeal, she could not raise any question not raised by appellant. In answer, we say she can present any question of fact or of law disclosed by the record to show that the judgment is correct and ought not to be disturbed. *First National Bank v. Wright*, 50 N. W. 23; *Randle v. Pacific Railroad*, 65 Mo. 325; *Witt v. Trustees*, 13 N. W. 261; *Reed v. McConnell*, 133 N. Y. 425 (31 N. E. 22).

Ballinger, Ronald & Battle, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is a suit to establish a claim presented by the appellant to the respondent, as the administratrix of the estate of John P. Gale, and by her rejected. The court decided that the claim presented to the administratrix was not properly verified to entitle it to allow-

ance, and judgment was entered against the plaintiff on this theory, and the decision of the court in this respect is the error assigned by the appellant here. It was claimed here, that the question of the sufficiency of these verifications was decided by this court in *Taylor v. Gale*, 14 Wash. 57 (44 Pac. 110), and the doctrine of *res adjudicata* is invoked; and the brief of the respondent in said case was offered in evidence by the appellant in the case at bar in support of his contention that the question had been formerly adjudicated. We have examined the case in 14th Washington and the briefs upon which that decision was rendered; and while it does not appear in the opinion that the question of the sufficiency of the verification to the claim was passed upon, and while, of course, the court has no recollection of what the view of the court in that respect was at that time, the brief of the respondent in that case shows plainly that the court must have considered that proposition, and passed upon it in favor of the appellant's contention. It is true, this question was not raised by the appellant in his brief; but there was no occasion for him to raise it, as the trial court at the former trial had passed upon that question in his favor, and had admitted the claims in evidence. It was, however, raised by the respondent, and argued as a material question in the case; the insistence being that, no matter what the views of the court might be on the errors alleged, a new trial would not be granted, for the reason that the lower court had erred in its admission of the claims, and that plaintiff's case would fail in any event, for that reason. Subdivision 4 on page 35 of the respondent's brief on the former appeal, commences with this language: "If in no event the appealing party is entitled to recover, a new trial will not be granted, even though reversible error should have occurred during the trial." The remainder of the brief

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is devoted to an argument against the legality of the claim, by reason of the insufficiency of the verification. This proposition was then answered by an argument in the reply brief of the appellant. The argument of the respondent on this proposition was somewhat exhaustive, and many authorities were cited to sustain the contention. From this it is evident that the court must have concluded (although for some reason no expression was made in the opinion to that effect) that no error had been committed by the lower court in admitting the claim; for it would be not only a foolish but harmful practice to reverse a case and order a new trial, and put the appellant to the delay and expense of a new trial, when it would necessarily follow that the trial could not result in a judgment in his favor. That is exactly what was said by the respondent in his brief on the former appeal when he used the language quoted above. This is so plain a proposition, and has been so often enunciated by this court, that it will not be presumed that an order for a new trial was made on the presumption that the appealing party was not entitled to recover in any event. It is said by the respondent in his brief in this case that "numerous opinions have been rendered by this court wherein it is expressly stated that the court expressly refuses to pass upon questions raised for the reason that the same may not again arise upon a retrial of the case." That is true, but the admission of these claims is a pivotal question in this case, and one that must necessarily arise in the proper defense of the action, and does not fall within the class of incidental errors in the admission of testimony, or rejection of jurors, or questions of that kind, which the court was discussing in the cases referred to by counsel's brief.

The judgment will be reversed and the cause remanded, with instructions to overrule defendant's objections to the

admission of the claim in evidence on all the grounds urged.

REAVIS, C. J., and FULLERTON, ANDERS and WHITE, JJ., concur.

[No. 3715. Decided March 28, 1901.]

THE STATE OF WASHINGTON, *Respondent*, v. DANIEL
DOWNING, *Appellant*.

HOMICIDE — IDENTIFICATION OF BODY — CONCLUSIVENESS OF JURY'S
FINDING.

In a prosecution for murder, in which the identity of the dead body is a question in issue, for the reason that the flesh of its face had been eaten away beyond recognition, the verdict of the jury establishing identity of the body with that of the alleged murdered man is conclusive on the appellate court, when it appears that the deceased was last seen alive near the point where the body was discovered, that the body corresponded with that of deceased in stature, size and hair, that the clothing on it was similar to that worn by deceased when last seen alive, and that a button on the shirt was identified by a witness as having been given by him to deceased some months before.

SAME — CIRCUMSTANTIAL EVIDENCE — SUFFICIENCY.

In a prosecution for murder, the jury is not warranted in finding defendant guilty, when the evidence shows that deceased was last seen alive rowing his boat in the direction of defendant's shack, that ten days later his overturned boat was found adrift and two days subsequently his body was found partially embedded in the sand on the beach, about a mile and a half from defendant's shack; that by reason of decomposition and the feeding of crabs and gulls on the exposed portions of the face and neck it was difficult to tell whether violence had been used against deceased, but some of the persons witnessing the body were under the impression that the throat had been cut; that the defendant and deceased had theretofore had some slight quarrel over trivial matters, but there was no proof of

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bad blood between them; and there were no indications of the use of violence in or about the shack or the deceased's boat, nor was there any evidence of blood upon the clothing or boat of deceased, or upon the clothing or person of defendant nor upon the contents of his shack.

Appeal from Superior Court, Chehalis County.—Hon. CHARLES W. HODGDON, Judge. Reversed.

J. C. Cross, for appellant.

W. H. Abel, Prosecuting Attorney, for the State.

The opinion of the court was delivered by

FULLERTON, J.—The appellant was informed against by the prosecuting attorney of Chehalis county, charging him with the murder of Joseph Anderson, tried, and found guilty of murder in the first degree, and sentenced to be hanged. He appeals from the judgment of conviction, and assigns numerous errors for reversal, only one of which will be noticed, namely, that the evidence is insufficient to justify the verdict. It appears from the record that the appellant and Anderson had lived in the vicinity of Gray's Harbor, in Chehalis county, for a number of years. It is not clearly shown that either of them had any fixed abode, although the appellant had a shack at Gray's Harbor City which some of the witnesses spoke of as, and the appellant called, "his home;" and that Anderson for the last few years lived most of the time in a scow located on the south side of the harbor. The appellant lived by fishing, which he gives as his principal occupation, and by catching and selling drift logs. Anderson lived by the same means, and by clam digging, and buying and selling fish. For some days prior to June 2, 1899, the appellant was at a fishing shack located on the Gray's Harbor side of Damon's Point, being that strip of land lying between the

Pacific ocean and Gray's Harbor immediately north of the entrance to the harbor, engaged in catching drift logs. The last time Anderson was seen alive by any person other than the appellant was shortly after noon of June 2d. At that time he ate his dinner at Damon's residence, which is some five miles north of the fishing shack where the appellant then was, leaving shortly thereafter in a boat, going in the direction of the fishing shack. He was dressed in a blue shirt, short coat, overalls, and wearing rubber boots. The next day a quantity of fish were missing from the Oyehut dock, evidently having been stolen the night before. This dock was some six miles distant from the fishing shack where the appellant had been stopping, and towards which Anderson was seen going on the day before. Within a day or two thereafter a warrant was sworn out for the arrest of the appellant and Anderson, charging them with having stolen the fish. The appellant was arrested on the warrant, and a search of his premises made for the stolen property, but, as nothing was found to implicate him in the theft, he was discharged without trial. Anderson was not arrested, or, so far as it appears, found by the officer having the warrant. On the 12th of the same month Anderson's boat was found drifting in the waters of the harbor, overturned.

On the 14th of June, 1899, the body of a man was discovered lodged on the Damon Point beach somewhere near a mile and a half from the fishing shacks above mentioned. The body was lying on its back, directly behind a large log, partially embedded in the sand. The left arm lay along the side of the body, partially under the log, the hand entirely covered, the right arm was extended horizontally, leaving the hand exposed. The feet were bare. It was dressed, according to the testimony of the two witnesses who first discovered it, and of another who saw the

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body the same day, in overalls and blue double-breasted shirt, and, according to the undertaker who removed the body, it had on, in addition to the clothing described, a suit of underclothing and a coat buttoned over the shirt. Between the clothing and the body sand had washed and packed to such an extent that the clothing had to be torn and cut in order to remove it. The flesh from all the exposed parts of the body had been eaten off, as some of the witnesses testified, by crabs and gulls. The eyes were gone. The point of the chin and all the facial bones above the chin were bare. Describing the throat, one of the witnesses who discovered the body said:

“We noticed a cavity or space between the chin and the collar of the shirt. We noticed a cavity there that might have been probably two and a half inches or an inch wide. It seemed to extend quite far back into the throat.”

Another testified that the shirt was buttoned quite close around the neck, and between that and the chin “there seemed to be a dark shade about the thickness of a man’s hand; . . . a crack or cavern right under the chin. It looked to me, you might say, the skin and the flesh was very evenly parted by some sharp instrument; smoothly done, as near as I could do it, or anybody else.” Another testified as to the opening, giving its size as about the width of a lead pencil, but whether it was rough, jagged, or smooth on the edges he did not look closely enough to see. The undertaker who removed the body testified that all of the flesh on the exposed side of the neck above the collar of the shirt was gone, leaving the flesh even with the shirt line. The body was removed from the place where it was found, and taken to Aberdeen, and buried on the 17th of the month. The next day it was exhumed at the order of the coroner, and on the 21st an inquest was held, and the body reburied. The appellant’s arrest followed the coroner’s inquest, and upon his motion the body was

again exhumed on July 5th on the order of the trial court, and examined by physicians appointed for that purpose.

It is urged that there was not sufficient evidence to justify the finding of the jury that the body was that of Joseph Anderson. It is true that the body was so far mutilated that little was left of the physical features by which identity could be established, but on this question we cannot say that the verdict of the jury was not supported by sufficient evidence. All the witnesses agree that the size and stature of the body was the same as the size and stature of Anderson, and one purported to identify it as Anderson's body by the teeth, although on this point he was contradicted as to the actual condition of the teeth of the body. All of the witnesses agree, also, that the clothing found on the body was similar to that worn by Anderson, and one identified a button found on the shirt as one he had given Anderson some months before. Still another says the hair of the head was iron gray, which seems to be conceded to be the color of Anderson's hair. This, taken in connection with the fact that the body was found near where Anderson was last seen alive, made a case sufficient to go to the jury, and, this being true, their finding thereon must be accepted by an appellate court as conclusive.

It is next urged that the evidence was insufficient to justify the finding of the jury that the death was the result of a crime. The principal witness on behalf of the state as to the cause of death was the county coroner. He was a physician and surgeon of long standing, having practiced his profession for over forty years. He testified that he first saw the body on the 18th of June, in the cemetery, where it was exhumed for the first time; next on Wednesday the 21st; and lastly on the 5th of July following. Speaking of its condition, on his direct examination, he said:

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"The first time I examined, the indications were plain to me that the throat had been cut,—the carotid arteries cut off; the flesh gone from the face and head and skull, and some decay had commenced to take place. The corpse was somewhat offensive. There was a spot over the frontal bone that had every indication there had been a blow. There was discoloration. It was not natural."

The coronal suture on the left side "was slightly open, and blood oozing from it." The common carotid artery was severed below the point of bifurcation. The trachea was not cut. The upper portion of the undershirt was very dark. "It had the appearance to me of having been colored with blood." The flesh above the clothing had a smooth, clear line of demarkation. The jaw bone was visible, having no flesh on the point of the jaw, but some back under the jaw. "I thought at first that the point of the epiglottis had been clipped off, but on the last examination I found it was not the case. I thought the evidence so plain that I did not make as close an examination as I would otherwise." Asked what, in his opinion, was the cause of death, he answered: "It was caused by having his throat cut." The blow on the head, he testified, would not have been sufficient to cause death, though it might have stunned the person for a time. On cross-examination, he said he had testified before the committing magistrate. Did not remember whether he had testified then that no one but a surgeon could sever the carotid arteries without affecting the windpipe, though he might have so testified. That he did say there was a point cut off the epiglottis of about one-half or three-quarters of an inch. Did not remember whether he testified before the committing magistrate that he didn't examine closely enough to see whether the esophagus or trachea had been cut, or whether he said no one could cut the arteries without cutting the windpipe. If he did, "it would be on supposition." He did not remem-

ber whether or not he had pointed out to the physicians appointed by the court to examine the body the distortion of the skull, but presumed he did. He testified further that the flesh was all gone from beneath the chin, and nowhere extended from jaw to jaw; that, if the throat was cut, it was cut above the epiglottis; that he did not make sufficient examination to ascertain whether the internal carotid artery was cut or not; that the discolored undershirt was not removed from the body, and was buried with it.

Dr. Smits, one of the physicians appointed by the court, testified: That the carotid arteries were severed on a line, and that the edges were smooth. That it was impossible for any one to say whether the arteries were cut with a sharp instrument or not. "All I can say is that they seemed to be smooth cut. Whether they were cut with a sharp instrument or not, I could not say; but they were smooth, and all on a line, and further than that I could not say." That he examined the skull at the place indicated by Dr. Bush for fractures, and could find none. Could observe no blood stains, such discoloration as there was came from decomposing flesh. That the flesh was all off the lower jaw bone and most of the face. The trachea and glottis were intact, and showed no cuts or abrasions. The line of flesh from the clavicle backward was plain in front, but further back it seemed to lose itself in the decomposing flesh of the neck. The demarkation was not clear. The carotid artery was severed below the point of bifurcation. "Q. So it was just one artery you found? A. That is all."

Dr. Walston, the other physician appointed by the court, testified: That he examined the body in connection with Dr. Smits. That he examined the skull specially at the place pointed out by Dr. Bush, but found no fractures or distortions there or elsewhere. That the trachea and esoph-

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agus were intact. That he observed the carotid artery. It was severed below the point of bifurcation, and from two and a half to three and a half inches of it gone. That it would be impossible for it to retract to the point where it was found if severed above the trachea. Besides, it would have been cut above the point of bifurcation; and two arteries, one in front of the other, instead of one, would be found. That the veins had all collapsed and decomposed with the flesh, so that they could not be seen. He was not asked as to his opinion concerning the cause of the death.

We have quoted from the testimony of a part of the witnesses who discovered the body. Another testified: That on finding the body he took a stick, and scraped the sand off the neck and from the side of the head, so as to see the hair. That he noticed "they were clotted with a kind of something that looked like blood,—had been clotted together. I could not tell what. I didn't look close enough to see, but it was on the right side of the head." This witness testified that the flesh seemed to be severed on a line with the clothing buttoned around the neck, and had a smooth appearance; that he had no opinion, based on what he observed, as to the cause of the cavity in the throat, or why the flesh was off the face, but he saw a number of sea gulls around the body when he first came up to it, and "supposed they picked it off." He testifies also, that the skull was cracked,—“a split about three inches long;” but, when pressed on examination, he admitted that it might have been the line of the coronal suture which he had mistaken for a “split.” Other non-professional witnesses testified that the flesh on the throat looked like it had been severed by some sharp instrument, but their general description of its appearance did not differ materially from the description given by the witness from whom we have quoted.

Our attention is called to much in the record concerning the relations existing between the appellant and Anderson previous to the disappearance of the latter, and to statements made by the appellant relative to his disappearance subsequent to that time. It is insisted first that they were partners. Why this fact is deemed material does not clearly appear, but conceding it to be so, there is little or no evidence to support it. It is not shown that they were ever engaged in any joint adventure, or that they owned any property in common. It does appear that the appellant at one time marketed a few logs belonging to Anderson along with certain of his own,—the circumstance referred to farther on,—but it is not claimed that they were jointly interested in them. The evidence relied on, however, is the statement of a witness to the effect that the appellant spoke of himself and partner as having a raft of logs ready for market. The witness states directly that the appellant did not give the name of the partner, nor did he know to whom he referred, and that the conversation occurred close to or about the time of the disappearance of Anderson. How this testimony established a partnership relation between the appellant and Anderson it is somewhat difficult to understand. It is next shown that the appellant and Anderson had had difficulties on one or two occasions. The most serious of these was over a rope. It seems that Anderson had picked up a rope that the appellant claimed, and had carried it to the Hoquiam wharf for the purpose of taking it away with certain other articles he had at that place. The appellant appeared at that time, claimed the rope, and took hold of it. Anderson then took hold of it, and the two went to pulling on it. The further proceedings are detailed by the state's witness as follows:

“They got hold of it,—hold of each end of the line,—

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and pulled around there quite a while; and finally Mr. Anderson reached in his pocket, and pulled out a knife, with no intention to hurt any one,—pulled out a knife to cut the line in two,—and I said, ‘Hold on Joe, I would not cut that line in two,’ and I persuaded him not to cut the line; and in the meantime Mr. Downing got out his knife, and Tommy Soules and I made him put it up.

Q. What, if anything, did the defendant do, or attempt to do, with the knife? A. He didn’t do anything. We didn’t let him do anything.

Q. What did he say? A. Well, that would be pretty hard for me to tell exactly.

Q. As near as you can? A. He drew the knife out, and he says,—in the first place he says, when Mr. Anderson drew his knife he says,—‘You are going to cut me, are you,’ and old Joe didn’t make any pretensions toward doing anything of that kind. He reached in his pocket, and got out his own knife, and said he would do a little cutting himself if Joe was going to do any; and Tommy Soules and I interfered, and made him put his knife up. I told you I didn’t remember exactly what he said. There was quite a conversation took place, and it was really nothing to me. I didn’t pay attention to it particularly. I could not say exactly what the conversation was. . . . Tommy Soules says; . . . ‘I will tell how we will settle this. Let me have the line, and I will put it away up in the warehouse, and when you come to the conclusion who is the owner, why, I will give that man the line,’ and they both agreed to it, and Tommy took the line, and curled it up, and put it away in the warehouse, and it is there yet.

Q. State whether or not either party expressed any threats at that time? A. Well, no; I don’t think there was.”

On cross-examination the witness said both parties had been drinking, and were slightly intoxicated. It was shown also that previously on the same day the appellant and Anderson had a dispute over the amount due Anderson for certain logs which Anderson had turned over to the

appellant for sale. The logs were rafted with a number belonging to the appellant, and the question was what proportion of the rafting charges Anderson should pay. The state's witnesses go over the matter in detail, and show that some coarse, drunken talk was indulged in between the two. One of them testifies to a threat made by the appellant against Anderson; another to the threat, but was unable to state whether it was Anderson or the appellant who made it. The appellant finally suggested that they submit the dispute to the decision of some third person. This was done, and the matter was settled in that way. Of the statements made by the appellant subsequent to the disappearance of Anderson those claimed to be the most damaging are found in the testimony of witnesses Ziegler and Grayson. The former testified that the appellant employed him to repair a pair of shoes, and while in his shop made statements relative to the disappearance of Anderson, which he relates as follows:

"He [meaning appellant] says, 'they are all down on me,' and Mr. Dinsey—he blamed Mr. Dinsey for being one of his enemies—and 'Mr. Dinsey,' he says, 'don't know what he was speaking about.' He says, 'What they got him here for?' And they wanted to know where Anderson is, and he says, 'Anderson is dead, drowned;' and why he knows it, he says, he started out in a small boat, and according to the rough weather he could not come out when he would get the fish in the boat; he could not make it; and he says how he hated to go and live in that neighborhood, or live in that neighborhood, and meet the dead man's face, and he have to meet him some place. So they kept on talking together, and after a while they started out of the shop, and when Mr. Downing came in again he got his shoes, and I didn't have no more talk with him, and Mr. Dinsey didn't come back any more."

The cross-examination was as follows:

"Q. You say you don't know when this was?

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A. What did you say?

Q. Do you know what month it was?

A. Well, it was in the month right after he was discharged on the first arrest.

Q. It was after the discharge?

A. Yes.

Q. He was getting ready to go home?

A. Yes, sir.

Q. Was he telling about their having him arrested up there?

A. Yes, sir.

Q. He was grumbling about these other people,—said they were prosecuting him, or were down on him?

A. Yes, sir.

Q. And he was accusing Mr. Dinsey of being one of the parties to the prosecution?

A. Yes, sir.

Q. How did the matter of Anderson come up? Who spoke about Anderson first?

A. Well, really, I could not tell was it Dinsey or was it Downing. He says, 'They have got me here for stealing fish,' and he says, 'That Anderson——.' He blamed Anderson for stealing the fish. That is what Downing says.

Q. He says Anderson was drowned?

A. Yes, he says, 'Anderson is drowned.'

Q. He told you why he thought so?

A. Yes, because in the small boat he started out, and he could not make it and by having so many boxes of fish in his boat.

Q. He said he had so many boxes of fish in that boat?

A. And in the rough water, rough weather.

Q. In the rough weather he would get drowned?

A. Yes, sir.

Q. That is the reason why he thought he was drowned?

A. Yes, sir.

Q. You say he then stated that he didn't want to go back down there for fear he would meet him, or see his dead body?

A. He hated to go back, but he had to go and live in that neighborhood."

The testimony of Grayson, as shown by the record, was as follows:

“Q. Give your full name. A. Lester A. Grayson.

Q. You are subpoenaed as Lester Grayson.

A. Yes, sir.

Q. Where do you live? A. Gray’s Harbor City.

Q. Did you know Dan Downing? A. Yes, sir.

Q. This man here? (referring to defendant). A. Yes.

Q. You are a stepson of Jacob Eyerly? A. Yes, sir.

Q. And you live with him at Gray’s Harbor City?

A. Yes, sir.

Q. Do you remember a conversation which you had with Dan Downing in his shack at Gray’s Harbor City?

A. Yes, sir.

Q. When was that? A. Sunday the 11th.

Q. Of what month? A. June.

Q. Who was present? A. Willie Hughes.

Q. Was Willie there all the time?

A. He left a little while before I did.

Q. Willie Hughes is a witness here is he not?

A. I think he is.

Q. Did you have a talk with Dan Downing that day?

A. Yes, sir.

Q. Go ahead, and tell the jury the conversation,—what it was?

A. Well, I went into Mr. Downing’s cabin,—it was about nine o’clock, or a little after,—and I asked him if I could get some chewing tobacco, and he had no chewing, but he had some smoking, I went and got some smoking tobacco, and we was speaking of different parts of there, and acquaintances over there, and acquaintances around there, and I began to talk with him about Jim Fowler at Sand Island, on the Chehalis river, and he said he never knew anything good of him, and I told him I didn’t either; that he beat me out of fifteen dollars.

Q. Who are you speaking about?

A. Jim Fowler. And then we quit that subject for a few minutes, and he got arrested for supposed to be stealing fish and he got out of that, and—

Q. Just tell what he said,—what Downing told you?

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A. He was sitting in Frank Kaufmann's saloon—

Q. Did he say this?

A. Downing said that,—that he was sitting, I think, in Frank Kaufmann's saloon in the afternoon,—and Fowler came in, and began to accuse him.

This is all objected to.

By the Court: Did Mr. Downing tell you that?

A. Mr. Downing told me that.

Q. When you saw Downing in his shack?

A. Yes, when I was down in his shack.

Q. What has that got to do with this?

A. I suppose he had to explain.

By the court: Just tell what Downing said.

A. He was sitting in Frank Kaufmann's saloon, I think, he said, and Frank Kaufmann—

This is objected to by counsel for the defense as it is not competent.

By the court: He may show anything that Downing said about this case, he may so testify: Just state what he said, if anything, about Joe Anderson and about this case.

A. Well, he was sitting in Frank Kaufmann's saloon and he had just got out of jail up here and Jim Fowler came in—

By the court: Just state what Mr. Downing said about Joe Anderson, never mind what he said about Jim Fowler or anybody else:

A. Well, Joe Anderson—he said that Joe Anderson and some other man had mysteriously disappeared, and no one ever knew what became of him. I believe that is all he said, if I remember.

Q. What, if anything, did he say with reference to the time they disappeared?

A. He didn't mention that at all.

Q. State whether or not Downing made any reference in that conversation to himself, or used the words 'Old Dan.'

A. Yes, sir.

Q. Tell what that was.

A. He said "Old Dan" had outlived Joe Anderson

and some other man. I forget the name. I forget who he was. I don't remember.

Q. Was the word Heap used there?

Objected to as improper. Objection sustained.

Q. Was that all that was said, Lester?

A. Yes, I think it was, as near as I can remember.

Q. You haven't given the part concerning Fowler?

A. No.

Q. You have left that out?

A. Yes, sir.

J. Did you have any other talks with Downing?

A. No; not since then."

CROSS EXAMINATION.

"Q. The piece you had to speak is spoiled?

A. Sir?

Q. The piece you had fixed up to say is spoiled?

A. No, sir.

Q. You didn't get to say what you thought you were going to get to say?

A. No, sir.

Q. Then it is spoiled, is it not?

A. The court didn't allow me to say—

Q. So what you had fixed up to say is spoiled?

A. I had nothing fixed up to say only what Mr. Downing told me.

Q. This was the first time you had ever seen Downing, was it?

A. It was, sir.

Q. That morning about nine or ten o'clock was the first time you ever saw him?

A. No, sir; I went one time and passed over, and just seen him. It was the first time I ever spoke to him, though.

Q. The first time you ever spoke to him, you went in and asked for tobacco?

A. Yes, sir.

Q. He said he didn't have chewing and you went on to help yourself to what he did have?

A. Yes, sir.

Q. You did?

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A. I took a little bit of smoking, yes.

Q. How long were you there?

A. About half an hour or more.

Q. You stayed there half an hour?

A. Yes, I guess a little over half an hour.

Q. Did Downing tell you to call again?

A. Yes, sir.

Q. What was Downing doing when you first went in?

A. He was standing up at the table, scraping something, I think.

Q. What was he doing when you left?

A. He laid down on the bed. He was laying down.

Q. Was he reading a newspaper?

A. I think he was.

Q. The tobacco was sitting on the table, wasn't it?

A. Yes.

Q. And you say the little Hughes boy was there?

A. Yes, sir.

Q. He was standing around mixing up with you and Dan Downing in your talk there?

A. Oh, yes; but he left before I did.

That is all."

Still another is the statement of an Indian witness, who testified that the appellant asked the witness to go with him in search of Anderson's body, saying that he *saw* Anderson drown.

The appellant testified in his own behalf. On his direct examination he stated that the last time he saw Anderson was on the evening of June 2d; that Anderson came to the fishing shack on the Damon Point beach in the evening of that day; that he left there in his boat between seven and eight o'clock, going in the direction of Oyehut dock, saying he was going to that place to get some thousand pounds of fish. In detailing the conversation between himself and Anderson, he said that Anderson requested him to keep a light burning until he returned, as he might, in the darkness

of the night, go around the point and out to sea. On cross-examination he said that he kept the light burning until after eleven o'clock, when he put it out because he had but little oil; giving in this connection the further explanation that Anderson had inquired of him how he might go from the Oyehut dock by way of Grass Creek on his way to Hoquiam, and that he thought, when he did not return by that hour, that he had gone in that direction. It was thought material to contradict him as to the matter of the amount of oil in the lamp. Two witnesses were recalled, who testified that they were at the shack some fourteen days later, and found a lamp there nearly full of oil. No testimony was offered directly explaining this difference, but the description of the lamp found by the witnesses and the one described by the appellant as having been used by him do not coincide in any particular, and it appears that this shack was a common stopping place used by every one who happened to be in its vicinity and desired a temporary shelter. We would hardly have thought this circumstance of sufficient consequence to deserve mention were it not for the fact that stress is laid upon it in the brief, and the fact that a juror who made an affidavit in opposition to the motion for a new trial mentions it as being considered as of some importance while the jury were deliberating upon their verdict. The foregoing, with some additional minor contradictions, and the testimony of witnesses to the appellant's reputation for truth and veracity, constitutes the material part of the case on the part of the state. There was no evidence of blood stains on the clothing taken from the body nor on the overturned boat. There was no evidence of a struggle at the shack where the murder was supposed to have been committed; no blood stains on the floor, the bed, or bed clothing, nor on the clothing of

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the appellant. There was some testimony to the effect that the appellant had left certain of his underclothing in water at his shack in Gray's Harbor City until they had soured, but it is not shown that they bore evidences of blood stains, or that they were anything more than clothing that had been worn too long without washing.

The theory of the state is that Anderson was killed by the appellant on the evening of June 2d, the day he was seen going in the direction of the fishing shack where the appellant then was. It is suggested that the murder occurred after Anderson had removed his outer clothing for the purpose of retiring, or after he had retired; that he was first struck on the head and stunned by some blunt instrument; that his throat was then cut; that the murderer then dressed the body with its customary clothing, omitting the foot gear, threw the body into the waters of the harbor, and overturned and cast adrift the boat; that the murderer then went to the Oyehut dock, secreted the boxes of fish, so as to make it appear that Anderson had gone there to steal fish and had been drowned in the attempt. This theory, it is said, accounts for facts that would be otherwise seemingly inexplicable; that it accounts for the fact that no blood stains were found upon the clothing other than the undershirt; that no blood stains were found on the boat, or in the shack, or that there were no evidences of a struggle at the shack; that the feet were bare; and that no traces of the fish, or the boxes which contained them, were discovered. But it seems to us that the evidence falls far short of proving this theory. The body when first discovered had been dead for some thirteen days. It lay for three days where found before it was removed. During all of this time it was subjected to the ravages of the creatures of the sea, and for how much of this time to the ravages of carnivorous birds

is not known. All of the exposed parts of the body had been denuded of its flesh. Manifestly, the statements of witnesses, who did no more than look at the body where it was lying, to the effect that the flesh on the throat had the appearance of having been severed by some sharp instrument is not entitled to much weight when the cause that produced the death is the matter in issue. The only one of the physicians who expresses the opinion that death was caused by the cutting of the throat saw the body for the first time after it had been dead seventeen days, and after it had been transported several miles, buried, and exhumed. That his examination of it then was but little more than cursory is abundantly proved by his own statements. Between that time and the last time he examined it, he was a witness on the preliminary examination of the appellant. Then he testified to conditions which he afterwards admits did not exist, and he was mistaken as to the color of the undershirt. Surely, if mistaken in particulars directly before his eyes, he might be mistaken in the more important one, viz., his statement as to the cause of death. Again, it would appear that he was mistaken as to the rupture at the coronal suture. This would not heal after death, and, had it been visible at the time he first examined the body, it ought to have been so to the physicians appointed by the court. And that his statement concerning the carotid artery is much weakened by the testimony of the other physician is also apparent. True, there is nothing in the record which tends to impugn the honesty of the witness. He was frank and open in all of his statements. If aught appears against him at all, it is his intense interest in the result of the prosecution, arising, no doubt, from an honest conviction that a crime had been committed, and the desire to see the guilty party brought to justice. But, giving his testimony all the weight to

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which it is entitled, it cannot be said that it establishes the fact that the death of the deceased was caused by cutting his throat to that certainty which this character of case requires.

But it is asked, how can the bloody undershirt be accounted for? If it were necessary to account for it at all, perhaps the best answer would be to say that no one testified that the undershirt was bloody. The most that can be said for the state's evidence on this point is, that certain of the witnesses said there was a dark stain on the breast of the shirt next to the throat, "which had the appearance of being colored by blood." This falls far short of proving the fact. In truth, it would appear that the fact that these stains were of importance was largely an after thought. If what is contended for it now be true, it was the only telltale garment upon the body, yet it is the only one not preserved and produced for examination. It would seem that if it had been regarded as of vital importance when evidence of crime was being sought for, it would have been subjected to such examinations and tests as would put the possibility of mistake beyond cavil.

Stress is laid upon the fact that the feet of the body were without covering, as being a circumstance tending to show the improbability that the death was caused by drowning. It is said in the brief of the state that "the inherent improbability of Anderson, while actually drowning, being able to remove his shoes, . . . is apparent," and from the affidavit of the juror above referred to, this fact seems to have been considered by the jury as of importance while making up their findings; this on the theory, apparently, that his distress would be so great that he would have no time to unlace them. But the strange part of all this is that there is not a line or syllable of testimony in the whole record—at least noth-

ing is pointed out to us, and we have found nothing—that indicates that Anderson was wearing shoes at that time. On the other hand, the only witnesses who mention his foot gear say he was wearing rubber boots. It is so stated by the state's witness who saw him at Damon's residence on the day of his disappearance, and by the appellant himself. Certainly it would not be unnatural for one familiar with water to remove from his feet such cumbersome articles as rubber boots at the earliest moment he anticipated the possibility of being thrown into water where he would be obliged to swim. In this connection, as illustrating the straits to which the state is driven, another matter is worthy of mention. Evidence was introduced showing the condition of the Oyehut dock as tending to prove that Anderson could not have stolen the fish because of the impossibility of getting them from the dock into the boat. Speaking to this question, the counsel for the state says: "From an inspection of the dinkey [Anderson's boat] and the photograph of the dock it is clear that it is a physical impossibility for one man to put even one box of fish in the dinkey from off the Oyehut dock, and *a fortiori*, it was a physical impossibility to load ten boxes, or even half that number, of boxes of fish in the dinkey;" yet, in almost the same breath he says, "Would it not have been possible for Downing, after killing Anderson, to have thrown his body into the bay, cast the dinkey adrift after overturning it, then go to the Oyehut dock, secrete the boxes of fish . . . and then assert . . . that Anderson had gone to steal fish, and was probably drowned in the attempt?" Why this physical feat would be impossible for the one and possible for the other, or why Anderson might not take the fish off the dock over the same route the appellant would have to take them to secrete them, is not naturally apparent, nor is it

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explained in the record. On the question whether or not the boat could carry the fish, the state's case is silent. The appellant says that it would if the fish were taken from the boxes and put into the boat loose; and it was in this manner, he testifies, Anderson told him he was intending to load the fish. Another argument in this connection is that no trace of the fish boxes was found. It is said that had they been broken, and cast adrift, they certainly would have been seen. How potent this reasoning is may be gathered from the fact that the boat itself, which was of considerable dimensions, drifted for ten days before it was discovered, and, so far as it appears, no effort was made to find traces of the boxes until some weeks after they were lost.

The statements made to the witness Ziegler by the appellant to the effect that he hated to meet the dead man's face, and to Grayson, that he had outlived Joe Anderson "and some other man," we cannot think are entitled to the importance given them by the state. The first expresses a not unnatural feeling of men of his class, and the second—whatever else may be said concerning it—cannot be tortured into a confession of guilt. As to the testimony of the Indian witness, he states that the conversation between him and the appellant was had in Chinook. Admitting that the witness repeated the conversation as he understood it, it would hardly seem to one familiar with this barbarous jargon that the fact that the appellant made the statement attributed to him was proven beyond a reasonable doubt. The quarrel over the rope and the money received from the sale of the logs, however effective they might be as corroborative evidence were the main crime substantially proven, standing alone, are entitled to but little weight. More than this, they are shorn of much, if not all, of their virulence by the evi-

dence of the defendant's witnesses, who had equal opportunities to observe the conduct of the parties, and to hear what was said between them.

What little basis there is in the evidence to support the ingenious theory put forth by the state is apparent from the recitals we have made from the record. Its purpose, however, is rather to account for the lack of evidence than to reconcile facts shown by the evidence. How ineffective it is in this regard needs but little consideration to show. If the blow which is said to have stunned the victim was struck after he had removed his clothes, it must have been struck while he was in the shack. The murderer must then have carried or dragged him out of the shack to some obscure place before cutting his throat, else there would have been evidences of blood on some of the surroundings. After cutting the throat, he must have waited until the body had quit bleeding, and have washed off the gore, before replacing the every-day clothing, else they would certainly have borne some marks of contact with the blood of the deceased. It would hardly seem possible that a person capable of such cool, fiendish deliberation would have cast the body adrift with knife marks upon it capable of being recognized the moment the body was discovered, or that he would have cast it adrift at all, when it would have been so easy to conceal it where there was scarcely a probability of its ever being discovered. But this, as well as the theory advanced by the state, is mere speculation. The question is not what the appellant might have done, but what in fact did he do. Without further pursuing the inquiry, we conclude that there is no substantial evidence upon which the verdict of the jury can be sustained, and the judgment of this court will be that the judgment of the court below be reversed,

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and the cause remanded, with instructions to discharge the appellant; and it is so ordered.

REAVIS, C. J., and DUNBAR, ANDERS and WHITE, JJ.,
concur.

[No. 3196. Decided March 30, 1901.]

THE STATE OF WASHINGTON *on the Relation of Robert B.
Lehman v. ROBERT BRIDGES, Commissioner of Pub-
lic Lands.*

TIDE LANDS — FIRST AND SECOND CLASS — CONSTRUCTION OF STATUTE.

Under Laws 1897, p. 248, § 39, which provides that tide lands of the first class shall comprise tide lands "within or in front of the limits of any incorporated city or town, or within two miles thereof on either side," and all tide lands not included in the above class shall be known as second class, the term "in front of the limits of any incorporated city" must be construed as referring to only such lands as lie adjoining and in front of the limits of a city; and the term "within two miles thereof on either side" should be construed as referring to such tide lands as are located, by measurement along the general direction of the city shore line, within a distance of two miles from either of its two boundary lines which extend inland from such shore line.

Original Application for Mandamus.

B. F. Heuston, for relator.

Thomas M. Vance, Assistant Attorney General, for respondent.

PER CURIAM.—This is an original application made to this court by the relator, whereby he seeks a peremptory writ of mandate against the respondent, commanding him to receive and file the relator's application to purchase certain tide lands in the county of King, state of Wash-

ington, and to issue a contract of sale for such lands as second-class tide lands.

It appears from the record that the application to purchase was duly made to the respondent as required by law, and accompanying the application was a tender of the amount necessary to be paid before the issuance of a contract for the sale of second-class tide lands. The only question submitted for our determination is, Are the lands involved first or second-class tide lands, within the meaning of the statute classifying tide and shore lands? The act of March 16, 1897 (Laws 1897, p. 248, § 39), provides as follows:

“The tide and shore lands of the state of Washington, which are not reserved from sale by the constitution and laws of the state, shall be divided into two classes:

(1) Tide and shore lands of the first class, which shall comprise all tide and shore lands within or in front of the limits of any incorporated city or town, or within two miles thereof on either side, including submerged lands lying between the line of mean low tide and the inner harbor line, wherever harbor lines have been established or shall be established.

(2) All tide and shore lands in the state not included in the above class shall be known as second-class tide and shore lands, and shall be leased and sold as in the manner provided in this act.”

The record shows that the lands involved here lie opposite the easterly boundary of the city of Tacoma, and that the limits of said city on the easterly side extend from the upland of the shore upon which the city is built down to the bay, and intersect and cross the government meander line on the shore thereof in a general perpendicular direction, and extend on across the tide lands fronting on said shore and out into the navigable water of said bay, and thence “down the bay,” as the boundary is described, into Puget Sound; that the limits of such city thus include

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not only the meander line, tide lands, and harbor areas in front of the shore on which the city is built, but they extend out into navigable water from six to thirty fathoms deep, and at some places more than a mile from any shore; that the tide lands described in the petition are upon the opposite side of the bay from such city, and separated from it by navigable water, and by more than two miles, measured along the meander line of the shore upon which the city is built, but said lands do lie within two miles in a direct line across the bay from, and in front of, an imaginary city boundary line running up and down said bay midway between the shores thereof.

If these are tide lands of the first class, as contended by respondent, they must lie either "within" or "in front of" the limits of the city of Tacoma, or "within two miles thereof on either side." It is clear that they do not lie "within" the limits of the city. Do they lie "in front of" the limits of an incorporated city or town? We think not, within the meaning of the statute above quoted. It is our opinion that the legislature intended by the words "in front of" to include only such lands as lie *adjoining and in front of* the limits of an incorporated city, and it was not intended that the words should apply to lands which may happen to lie in front of a city in fact, but across a channel of navigable water and upon an opposite shore. It is possible for another city or town to be located upon such opposite shore, and in that event the lands adjoining or within its shore limits certainly could not be held to lie "in front of" the limits of another city upon an opposite shore when a channel of navigable water exists between the boundaries of the two. From a geometrical point of view "in front of" might include everything between the prescribed line and infinity; but, as applied practically to measurements on the surface of the earth,

we believe it can only mean immediately in front of,—that is, adjoining.

The remaining question is, are these lands “within two miles thereof on either side,” considered with reference to the limits of the city of Tacoma? The only measurement which brings them within two miles is by a direct line across the bay from and in front of an imaginary city boundary line running up and down said bay midway between the shores thereof. We believe the legislature intended by the language above quoted to determine the location of such lands by measurement along the general direction of the shore line, a distance of two miles from either of the two boundary lines which extend inland from such shore line. Such measurement, it is conceded, cannot include these lands. We, therefore, conclude that the lands involved must be held to be second-class tide lands, and that the relator is entitled to the relief which he asks. We accordingly direct the issuance of a peremptory writ of mandate in accordance with the prayer of the petition.

[No. 3543. Decided March 30, 1901.]

NORTHERN COUNTIES INVESTMENT TRUST, LIMITED, *Appellant*, v. A. J. ENYARD *et al.*, *Respondents*.

ADVERSE POSSESSION — OCCUPATION OF RIGHT OF WAY — WHEN CONSISTENT WITH EASEMENT.

Where a portion of the land granted to a railway for right of way purposes was, during its non-user by the railway, fenced and cultivated by the grantor of the easement and his successors for a period of more than ten years, no title by adverse possession inured to them, since the mere occupation of a portion of a right of way by the owner of the servient estate is not inconsistent with the easement, but must be construed as permissive, in the absence of acts upon his part actually tending to prevent the use of the right of way for railway purposes.

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Appeal from Superior Court, Cowlitz County.—Hon. ABRAHAM L. MILLER, Judge. Affirmed.

Ballou & Murdock, for appellant.

Crowley & Grosscup and *A. G. Avery*, for respondents.

The opinion of the court was delivered by

REAVIS, C. J.—In July, 1870, Angelica Gill received a final certificate of entry for certain lands in Cowlitz county, and on December 7th following she executed and delivered to the Northern Pacific Railroad Company her deed for a right of way for the construction of railroad and telegraph lines of two hundred feet of land on each side of the railroad as located and to be located across her premises. The deed contained the usual covenants of warranty, and was duly placed of record. The railroad company, in the latter part of the year 1871, located its line of road across the premises, and constructed and completed its road in 1872, and the railroad and its successor, the Northern Pacific Railway Company, respondent, have ever since continued to operate its railroad through said premises. On the 22d of March, 1873, Angelica Gill conveyed by deed of warranty the same premises to one Pumphrey, who, upon the delivery of the deed, entered into actual and open possession of the premises conveyed to him, and during such time continued in possession, cleared the land, and reduced it to a state of cultivation for farming purposes, and, upon entering into possession of the land, fenced and closed the same up to within twenty-five feet of the track of the railroad line, and his possession was peaceable and undisturbed for more than ten years. In May, 1890, Pumphrey executed a mortgage to the Lombard Investment Company, covenanting that he had a valid title in fee simple to the premises so mortgaged. The Lombard Investment Company as-

signed the mortgage, with the debts secured thereby, to appellant, and appellant foreclosed the mortgage, and became the purchaser of the mortgaged premises, and in November, 1897, received a deed from the sheriff for said premises. The area in dispute consists of a strip of land 175 feet wide on each side of the line of the railroad company. In the fall of 1896 the respondent railway company went into possession of the strip of land in dispute and leased it to the respondents Enyard and wife, who have been in possession of the premises as tenants since that time, using the land for ordinary farming purposes. Appellant, in August, 1898, commenced the action in ejectment against Enyard and wife to recover possession of the strip of land in controversy. The railway company intervened as the landlord of Enyard and wife. The principal facts were stipulated at the trial, in addition to which appellant introduced testimony relative to the possession, from which it appeared that Pumphrey, after the delivery of the deed from Gill to himself, cleared the strip of land in controversy; that in 1875 he put a rail fence along the land he occupied; and that he raised hay and grain and farmed generally. The railroad line was in the same place as where it was originally located. It also appeared that no objection to his occupancy of the strip was made by the railway company. At the conclusion of the trial the court withdrew the cause from the consideration of the jury, and entered judgment for respondents, dismissing the cause.

Appellant relies for title upon adverse possession. Counsel maintain that when the period of limitation has run a new title is created, and under such title the owner may maintain an action of ejectment to quiet title under general allegations of ownership. A number of authorities are cited to sustain the principle, including *Raymond v.*

Morrison, 9 Wash. 156 (37 Pac. 318), and *Rogers v. Miller*, 13 Wash. 82 (42 Pac. 525, 52 Am. St. Rep. 20). The correctness of this position may be conceded. But this proposition is answered by respondents' contention that the possession of appellant was not adverse; it was permissive; that the mere occupancy of a portion of the right of way of a railroad company by the owner of the servient estate is not inconsistent with the easement. Some of the authorities cited by appellant are to the effect that "the right acquired by the corporation, though technically an easement, yet it requires for its enjoyment a use of the land permanent in its nature and practically exclusive." *Hazen v. Boston & Maine R. R.*, 2 Gray, 574; also, *Hurd v. Rutland & B. R. R. Co.*, 25 Vt. 116; *Jackson v. Rutland & B. R. R. Co.*, 25 Vt. 150 (60 Am. Dec. 246); *Kansas Central Ry. Co. v. Allen*, 22 Kan. 285; *Illinois Central R. R. Co. v. Godfrey*, 71 Ill. 500 (22 Am. Rep. 122).

It is true that the right of way of a railroad company for the operation of a line of railroad and telegraph lines has some of the attributes of ownership of the fee. The possession of the right of way when required for some of the uses of the company must be practically exclusive for those uses. But the right of way of the railway company here is designated in the act of congress of July 2, 1864, incorporating the Northern Pacific Railroad Company, as a right of way. The deed from Gill to the railroad company is designated a right of way. The grant in the deed was evidently of an easement. The dominant estate for such uses as were not inconsistent with the uses of the right of way and the fee still remained in the grantor. Washburn, Easements (4th ed.), *p. 291.

It seems to be the general rule that a right of way lying in grant is not lost by non-user. *Pope v. O'Hara*, 48

N. Y. 446. It would seem, at any rate, to require some act upon the part of the owner of the servient estate which actually prevents the use of the right of way when required for the purposes of the railroad company, to give notice of adverse claim of right. *Noll v. Dubuque, B. & M. R. R. Co.*, 32 Iowa, 66; *Slocumb v. Chicago, B. & Q. Ry. Co.*, 57 Iowa, 675 (11 N. W. 641).

Relative to the right of the railroad company to the entire width of four hundred feet for right of way, a full discussion is found in *Northern Pacific R. R. Co. v. Smith*, 171 U. S. 260 (18 Sup. Ct. 794), and also *New Mexico v. United States Trust Co.*, 172 U. S. 171 (19 Sup. Ct. 128).

In *East Tennessee, V. & G. Ry. Co. v. Telford's Exrs.*, 89 Tenn. 293 (14 S. W. 776), it was observed:

"The use by Telford of the condemned land alongside of the railway company for agricultural purposes, so long as the same was not required for a purpose of convenience or necessity by the railway company, was a use entirely consistent with his right as the owner of the fee, and was not incompatible with the easement granted the railway. It was a use not made under notice to the owners of the easement, that its purpose was adverse to the easement, and it was not therefore adverse. The railway company had the right to terminate such use whenever they desired to put the land to a use incident to the operation of their railway. . . ."

In *Union Pacific Ry. Co. v. Kindred*, 43 Kan. 134 (23 Pac. 112), it was held that the occupation, cultivation and inclosure, by abutting land owners, of the right of way granted by congress could not be considered as hostile or adverse, and must be regarded as permissive only. We observe no distinction between the right of way granted by congress and the right of way granted by the appellant in this regard. The uses for the right of way in

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connection with the operation of the railroad may be many. It may require a use for additional stations or side tracks. The company must so use its right of way as to reasonably prevent the communication of fires in the operation of its engines. Many of these uses, it will be observed, need not necessarily be made by the company when its line is first constructed. They must all be regarded, however, as in contemplation of the grant of the right of way. The clearing, cultivation, and fencing of a portion of the right of way not in use at the time would not seem to be inconsistent with the continuing rights of the company. We do not think the acts of possession of appellant's grantors were such as to notify the company of an adverse claim to the strip of land in controversy. Such occupancy and use by appellant may be regarded as permissive. We think upon this ground alone appellant has failed to show sufficient title to maintain its action.

Arriving at this conclusion it is not necessary to discuss some other important objections argued by counsel for respondents.

The judgment is affirmed.

DUNBAR, FULLERTON and ANDERS, JJ., concur.

[No. 3553. Decided March 30, 1901.]

LEWISTON WATER & POWER COMPANY, *Appellant*, v.
COUNTY OF ASOTIN *et al.*, *Respondents*.

TAXATION — ENJOINING VOID TAX — JURISDICTION.

The superior court has jurisdiction of an action instituted to enjoin the collection of an illegal and void tax, and the property owner is not confined to proceedings before the board of equalization or appeal therefrom.

SAME — TENDER OF DUE TAX.

Where an action is brought to enjoin the collection of a tax alleged to be void, no tender is necessary, under the terms

of Bal. Code, § 5678, which requires the payment or tender of what is justly due as a prerequisite to suit.

SAME.

Under the requirements of Bal. Code, §5678, it is sufficient to plead payment and tender of the taxes justly admitted to be due, without tendering such portion of the tax as is claimed to be illegal.

SAME — CORPORATE STOCK — DOUBLE TAXATION.

The separate listing and taxation of the capital stock of a corporation and its real and personal property, where the capital stock is all invested in the real and personal property, is double taxation, and therefore illegal, in the absence of specific legislation authorizing it.

SAME — PLEADING.

In an action to enjoin the collection of taxes illegally assessed, an allegation in the complaint that the real and personal property of a corporation had been assessed; that at the same time its capital stock was listed and assessed; and that all the proceeds of the capital stock were invested in the real and personal property assessed, is a sufficient averment, as against a general demurrer, that all the capital stock is invested in said real and personal property.

Appeal from Superior Court, Asotin County.—Hon. MELVIN M. GODMAN, Judge. Reversed.

Sturdevant & Bailey, for appellant.

Walter Brooks, Prosecuting Attorney, and *Gose & Kuykendall*, for respondents.

The opinion of the court was delivered by

REAVIS, C. J.—Appellant commenced suit to enjoin the collection of a tax of \$256.60, levied upon its capital stock, assessed at a valuation of \$10,000, for the year 1897. The complaint substantially states that appellant is a domestic corporation with a capital stock of \$250,000. The corporation was formed for the purpose of acquiring and conveying water by conduits through pipes and canals on

Asotin creek, in Asotin county, to and upon adjacent lands, for irrigation and domestic uses and for manufacturing purposes; to generate electric and other power for manufacturing and other purposes; to convey, use, and sell water for mining purposes; to hold, convey, and condemn real estate in the states of Washington and Idaho; to borrow money on notes and bonds; and to mortgage property of the company therefor. It is alleged that in March, 1897, plaintiff owned in Asotin county a large amount of real estate subject to assessment, and that it was returned by the assessor at the aggregate value of \$58,670, and a description of the real estate so assessed is set out; that during the same month the personal property of the appellant was assessed; that at the same time the assessor listed and assessed the capital stock of plaintiff at \$10,000, and the amount of the tax levied thereon was \$256.60; that all the proceeds of the capital stock were invested in the real and personal property assessed; that in August, 1897, the appellant duly appeared before the county board of equalization at the proper time and demanded of the board that the capital stock so listed and assessed be stricken from the rolls and the tax be not extended thereon, which request was refused by the board; that all the taxes due have been paid except the sum of \$12.06, assessed and due on the personal property other than the capital stock, which has been duly tendered. Demurrers were filed separately by the respective respondents, each setting up two grounds; (1) that the court has no jurisdiction of the subject matter of the action; (2) that the amended complaint does not state facts sufficient to constitute a cause of action. The complaint alleges also that the assessment of the capital stock of the appellant corporation is illegal and void.

1. Relative to the first ground of demurrer, it may be

noted that the complaint alleges that the assessment upon the capital stock is illegal and void. Ballinger's Code, § 5678, requires the payment or tender of what is justly due on property assessed, but where the assessment is alleged to be void there is no payment or tender required. The plea of payment and tender of the taxes justly admitted to be due, as stated in the complaint, was sufficient, under the rule announced in *Landes Estate Co. v. Clallam County*, 19 Wash. 569 (53 Pac. 670). That an action may be maintained against a void assessment or tax levied has been ruled in *Benn v. Chehalis County*, 11 Wash. 134 (39 Pac. 365), and *Kinsman v. Spokane*, 20 Wash. 118 (54 Pac. 934, 72 Am. St. Rep. 24). The court had jurisdiction of the subject matter of the action.

2. The complaint is not so clear in its statements as it should be, but its allegations, taken together and as understood by counsel for both parties, seem to sufficiently charge that the assessment levied upon the capital stock of the appellant corporation is void; that the corporation having been duly assessed upon all its property, both real and personal, the valuation of the capital stock could not be added thereto. It is alleged that the capital stock, or the proceeds, is invested in the real and personal property assessed. It is true that counsel for respondents criticize the language of the complaint as not averring properly that the capital stock is invested in all the property. We think, however, as against a general demurrer, the allegations must be taken to state this fact. It is maintained by counsel for appellant that in the assessment of the shares of capital stock of a domestic corporation, where the property is all assessed to the corporation in which such capital stock is invested, a duplicate assessment and double tax is levied. We think this is correct. Judge Cooley on *Taxation* (2d ed.), p. 225, observes of double taxation:

"The same may be said of a tax on the property of a corporation and also on the capital which is invested in the property; if the latter is taxed as property, this also is duplicate taxation, and as much unequal as would be the taxation of a farmer's stock by value when on the same basis it is taxed as a part of his general property. When, for instance, the money paid in as capital of a manufacturing corporation has been invested in buildings and machinery, these are what then represent the capital, and to tax the capital as valuable property distinct from that which then represents it would be to tax a mere shadow; it would be to make the shadow stand for the substance in order that it might be taxed, when the substance itself is taxed directly under its own proper designation. We do not speak here of a taxation of the property and also of the *franchise*, those being two things,"

To the same effect is the rule applied in *People ex rel. Burke v. Badlam*, 57 Cal. 594. The court, by Judge Ross, observed:

"Now, what is the stock of a corporation but its property—consisting of its franchise and such other property as the corporation may own? Of what else does its stock consist? If all this is taken away, what remains? Obviously nothing. When, therefore, all of the property of the corporation is assessed—its franchise and all of its other property of every character—then all of the stock of the corporation is assessed, and the mandate of the constitution is complied with. . . . The share of each stockholder is undoubtedly property, but it is an interest in the very property held by the corporation. It is his right to a proportionate share of the dividends and other property of the corporation—nothing more."

Referring to this case with approval, the same court, in *Spring Valley Water Works v. Schottler*, 62 Cal. 69, reaches the conclusion that when the law is complied with by assessing all the property of the corporation, which property includes the franchise of the corporation, to as-

sess the shares will be double taxation, because it would be in effect to assess the same property twice for the same tax, which the constitution forbids. It is held that the franchise of a corporation of the character of those named in the petition is the property of the corporation and that *as property* it is taxable; and while it has been declared by this court that double taxation is not necessarily inhibited by our constitution,—*Commercial Electric Light & Power Co. v. Judson*, 21 Wash. 49 (56 Pac. 829), yet it was observed in *Ridpath v. Spokane County*, 23 Wash. 436 (63 Pac. 261):

“While the legislature may so adjust the revenue system as to occasion double taxation, such taxation will not be inferred unless necessarily imposed in carrying out the law.”

The list made up by the assessor under our revenue law is upon the valuation of property. We think, when all the property into which the capital stock of the corporation entered was assessed, the valuation of the corporation's property was complete. At the present stage of this suit we have no information beyond the statement that all the real and personal property was assessed. In the case of *Ridpath v. Spokane County*, *supra*, the statute for the assessment of the property of domestic corporations in the state was set out, and it was there determined that the capital stock of such a corporation whose property was assessable in the state could not be assessed to the individual stockholders resident in the state. It was there observed of property assessable to such a corporation:

“This includes both tangible and intangible property. The tangible property may be valued in connection with its use with the intangible.”

It has been repeatedly determined that the corporate franchises must be assessed to the corporation. *Commer-*

cial Electric L. & P. Co. v. Judson, supra; Edison Electric Illuminating Co. v. Spokane County, 22 Wash. 168 (60 Pac. 132); *Chehalis Boom Co. v. Chehalis County, ante*, p. 135.

But it is not contended by counsel for respondents that this tax is on the franchises of the company, though it is intimated that the tax might be upon other property of the company than real and personal property listed, and that the assessor's listing of the capital stock for assessment may be merely an erroneous classification, and not to the prejudice of the appellant. It is not, however, disclosed in any way that this assessment is not upon the capital stock, in addition to the other property which was properly assessed. The implication fairly deducible from the complaint, and which we have accepted, raises the question of the validity of the assessment upon the capital stock as such, and in addition to the other property of the company. It is true that, in the assessment of corporate franchises and privileges and intangible property, the assessor may properly examine the amount and value of the capital stock. It should be returned to him by the proper officer of the corporation for his information. One method of the valuation of the intangible property of the corporation, and a very fair one, is the market value of all the capital stock over and above the value of its tangible real and personal property. This method is approved by high authority. Cooley, *Taxation* (2d ed.), p. 230, and authorities cited in the margin; *Spring Valley Water Works v. Schottler, supra*.

But, as we have seen, the assessment of the capital stock of a domestic corporation which has all its property in which the capital stock is invested already assessed is duplicate taxation, and this latter result will not be inferred without specific legislation. It may be further

observed that § 1676, Bal. Code, in providing the method for the assessment of domestic corporations such as this, does not contemplate duplicate taxation.

The judgment is reversed, with direction to overrule the demurrers to the complaint, and for further proceedings in accord with this opinion.

DUNBAR, FULLERTON and ANDERS, JJ., concur.

[No. 3585. Decided March 30, 1901.]

H. O. SHUEY, as *Receiver, Appellant*, v. GEORGE B. ADAIR
et ux., Respondents.

BANKS — INSOLVENCY — SUPERADDED LIABILITY OF STOCKHOLDERS —
HOW DETERMINED.

There being no provision in the constitution or statutes for the method of determining the superadded liability imposed by art. 12, § 11, of the constitution upon stockholders in banking corporations, the method of its enforcement is necessarily left to be determined by the courts.

SAME — COLLATERAL ATTACK.

Where a receiver has been appointed by the court to take charge of an insolvent banking corporation, the court has jurisdiction, in an application by the receiver, to make an order fixing the total amount of the superadded liability to be imposed upon the stockholders, and it is within the discretion of the court to find the amount of the deficiency in the assets to meet the claims of creditors before the actual application of the assets to the satisfaction of such claims, and such an order is binding on the stockholders, as against collateral attack, in so far as it determines the amount which may be charged to them as a whole.

SAME — ACTION AGAINST STOCKHOLDERS — DEFENSES.

When the court charged with the administration of the estate of an insolvent banking corporation has made an order fixing the superadded liability of the stockholders, it has authority to direct the receiver to proceed against the stockholders to enforce the *pro rata* share of each, and in such action any stockholder may set up any defense personal to himself.

24	378
24	624
24	378
36	290
24	378
40	468

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SAME — COMMUNITY LIABILITY.

Where a subscription by the husband to the capital stock of a banking corporation was for the benefit of the community, the superadded liability imposed on stockholders in cases of insolvency is one which may be enforced against community property.

Appeal from Superior Court, King County.—Hon. ORANGE JACOBS, Judge. Reversed.

Clise & King, for appellant.

McCutcheon & Gilliam, for respondent.

The opinion of the court was delivered by

FULLERTON, J.—This is an action brought by the appellant, as receiver of the Seattle Savings Bank, an insolvent banking corporation, against the respondents, as stockholders therein, to recover upon their liability created by the constitution and statutes to answer for the debts of the corporation. On the trial, at the conclusion of the appellant's case, the court granted a motion for non-suit, and entered a judgment dismissing the action. The facts appearing in the record are substantially these: The Seattle Savings Bank was incorporated under the laws of the state of Washington as a banking corporation in 1891, commencing business as such on July 9th of that year. It continued as a going concern until January 11, 1897, at which time, in an action brought in the superior court of King county, it was adjudged insolvent, and the appellant was appointed its receiver. On the 5th day of April, 1898, the receiver filed a petition in the superior court praying that the court ascertain and determine the amount of the liabilities of the bank, the amount and value of the assets of the bank then in the hands of the receiver and remaining undisposed of, the amount required in addition thereto to pay the liabilities in full, and to assess the

stockholders upon their statutory and constitutional liability in such sum as would make up the deficiency. The court fixed the 7th day of June, 1898, as the time for hearing the petition, and directed that notice thereof be personally served on each of the stockholders residing within the state, upon the non-resident stockholders by mail, and that a copy thereof be published for six consecutive weeks in a daily paper of the city of Seattle. On the hearing upon the petition, the court found from the proof submitted that notice of the hearing had been served personally upon each of the stockholders except three only, none of whom are the respondents here. He further found the amount of the liabilities of the bank, the amount of cash and property in the hands of the receiver, and the amount necessary to be levied to make up the difference between the liabilities and the assets, which equalled forty-eight per cent. of the par value of the capital stock. The court thereupon "ordered, adjudged, and decreed that each, all, and every of the stockholders of the Seattle Savings Bank, equally and ratably, and not one for another, be and are hereby assessed on their statutory liability as such stockholders to the amount of forty-eight per cent. of the par value of the capital stock of said bank held by each of the stockholders thereof, respectively, as shown by the books of said Seattle Savings Bank on January 11, 1897," making said assessment payable to the receiver on or before the 15th day of July, 1898, and directing that written notice of the assessment be given to each stockholder by mail. The respondents did not pay the assessment, and leave was afterwards obtained of the court to bring the present action. It further appeared that the stock held by the respondents stood in the name of the respondent, George B. Adair, that he had held the same for only fifty-six of the sixty-six months of the time the

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bank was a going concern, and that, if the appellant was entitled to recover at all, he was entitled to recover only fifty-six sixty-sixths of the amount of the assessment. It also appeared that the respondents are husband and wife, and were such at the time the stock was purchased by George B. Adair. The prayer of the complaint was for a judgment against George B. Adair individually, and that the judgment be decreed a lien upon the community property of George B. Adair and wife.

The learned trial judge ruled that, inasmuch as the respondents were assessed for a proportionate share of the whole debt of the bank, regardless of the length of time they had owned stock therein, or of the amount of the debts and liabilities accruing while they were stockholders, the assessment was void, and therefore insufficient to form a basis for a recovery in an action at law. The respondent urges this proposition upon us here, and contends that this court has, in effect, so determined in the cases of *Wilson v. Book*, 13 Wash. 679 (43 Pac. 939), and *Shuey v. Holmes*, 21 Wash. 223 (57 Pac. 818).

The constitutional provision giving rise to the super-added liability of stockholders in a banking corporation is found in § 11, art. 12, of the state constitution, and is in the following language:

“Each stockholder of any banking or insurance corporation or joint stock association shall be individually and personally liable equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation or association accruing, while they remain such stockholders, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares.”

The statutory enactment on this subject (Ballinger's Code, § 4266) follows substantially the language of the constitution above quoted, and does not more particularly de-

fine the nature of the liability nor does it point out a method for its enforcement, but leaves the procedure, as we have said on another occasion, to be "determined by the courts." In *Wilson v. Book*, *supra*, we held that the liability created by this clause of the constitution is secondary, and could be made available to the creditors of the corporation only after its primary assets had been exhausted; that the liability thus created was a trust fund for the benefit of all the creditors, and could not be reached by a single creditor in an action brought for his own benefit; and that, when a receiver of an insolvent corporation had been appointed, the receiver was the proper party plaintiff in any proceeding instituted to enforce the liability. In *Shuey v. Holmes*, we held that this constitutional provision made stockholders in a banking corporation liable only for the corporate indebtedness accruing while they remained such stockholders; saying in that case:

"This superadded liability of the stockholder which exists by virtue of the statute and constitution is personal, and does not follow the stock. The obligation rests on the stockholder, not on the stock."

The latter action was brought by the receiver, who is appellant in this action, against another of the stockholders of the Seattle Savings Bank, to recover upon this same assessment. It was tried upon an agreed statement of facts. Judgment went against the receiver below, and the judgment was affirmed here, because it did not appear from the record "that the whole or any part of the indebtedness of the bank was incurred or created at any time while the respondent was a stockholder of the bank." In the only other case where this constitutional provision was directly before this court—the case of *Watterson v. Masterson*, 15 Wash. 511 (46 Pac. 1041)—we held that a creditor could not maintain an action to enforce this

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liability after a receiver had been appointed to wind up the affairs of the corporation, even though the action was prosecuted on behalf of all of the creditors of the corporation, and the receiver was made a party defendant in the action; reversing a judgment entered in an action of that character, and directing its dismissal. But in neither of these cases did this court prescribe, or undertake to prescribe, what form of procedure was necessary in order to charge the stockholders upon their superadded liability created by the constitutional provision above quoted. On this question we went no farther than to hold that the action brought against the stockholders directly, whatever its form, must be prosecuted by the receiver in all cases where a receiver has been appointed to administer the assets of an insolvent banking corporation; and much less are the cases cited authority for the contention that the present action cannot be maintained.

Passing, then, to the questions more directly before us, the first inquiry is, what effect shall be given to the order made by the court before which the insolvency proceedings were pending? It is the contention of the appellant that this order not only conclusively determined the amount necessary to be levied upon the stockholders as a whole to make up the deficiency between the assets of the bank and its liabilities, but that it also conclusively determined, against each of the stockholders personally served with notice of the proceeding, the amount for which each of such stockholders was liable; and consequently, in an action brought to enforce the assessment, the stockholder is estopped to question, not only the amount for which all of the stockholders are liable, but also his individual liability for the amount assessed against him. But, if this be true, it would seem there was little need for the present action. To give the order the force

and effect here contended for, is to give it the force and effect of a judgment, and there could be no reason why an execution should not issue directly upon the order without the further intervention of the courts. Moreover, to so hold would necessitate overruling the case of *Shuey v. Holmes*. That case directly decided that the validity of this very order, so far as it purported to fix the amount of the liability of the individual stockholder, could be questioned by the stockholder in an action brought against him to enforce it. On the other hand, we cannot agree with the contention of the respondents that the order is absolutely void. It must be held determinative of everything that was properly before the court in that proceeding, and within its jurisdiction to determine. One of these questions was the amount of the difference between the liabilities of the insolvent corporation and the value of its assets. From the very nature of the proceeding, this must be so. The power conferred upon a superior court to take possession of the property of an insolvent corporation and wind up its affairs, is conferred upon it for the purpose of enabling it to distribute the property of the corporation among its lawful creditors. To carry out this purpose, it must, of necessity, determine the validity and amount of the respective claims of the creditors; and, when it applies the assets under its control to the satisfaction of these claims, the amount of the deficiency is *ipso facto* determined. But we do not think an order finding the amount of such deficiency is void because made before the actual application of the assets to the satisfaction of the claims of creditors. The exigencies of the matter before the court when administering upon an insolvent estate require it to exercise a wide discretion. Justice to the creditors demands that they should have the secondary, as well as the primary, assets made

available for the satisfaction of their claims, and justice to the stockholders demands that the primary assets should not be sacrificed by their too hasty conversion into money. The court is thus confronted with two distinct, conflicting interests, each of which it is its duty to protect so far as lies within its power. It should not delay the settlement to such an extent as to render the secondary liability of no avail to the creditors, nor should it act with such haste as to unnecessarily increase the burden of the stockholders; and if, in its attempt to harmonize these conflicting duties, it finds the amount of the difference between the liabilities and the assets by determining the amount of the one and the value of the other, rather than by the process of conversion and application, its order in that respect will not be held void in a collateral proceeding on the mere suggestion of irregularity, even if it would be so held on a direct appeal from the order. We therefore conclude that the order in question is valid and binding on the stockholders of the bank, in so far as it determines the amount which may be properly charged to them as a whole upon their superadded liability.

Why, then, may not a stockholder be charged with his individual share of this liability in an action brought against him by the receiver under the direction of the court having the insolvency proceedings before it? The argument against it is rather one of policy than of strict legal right. It is said that it is extravagant and wasteful, and that it was condemned for this reason by this court in *Wilson v. Book*, *supra*. In that case the court did say that, inasmuch as this fund was a trust fund for the benefit of all the creditors of the corporation, it could "be reached only by a proceeding in equity for the benefit of such creditors," and that, if the right of action was confined to the receiver, the fund would "be subject to the control of

the court in a single action, and unnecessary delay and expense prevented;" and it may have been contemplated that the superior courts would, when the necessity of resorting to this superadded liability was established, direct the receiver to proceed against all of the stockholders within the jurisdiction of the court in a single action, and in that action adjudge the *pro rata* share for which each stockholder was liable, and enter several judgments against each of them for the amount found to be chargeable against them respectively; but the case is not authority for the proposition that no other remedy could be pursued, or that separate actions could not be brought against the stockholders individually. Nor do we know of any legal reason why the stockholders may not be pursued separately. When they reside in different jurisdictions, this is the only way they can be reached; and, if it is to be held that they must all be sued jointly, it is, in effect, holding that in many instances they cannot be sued at all. Like many other of the questions that arise in the course of the administration of an insolvent estate, this question must be left to the sound discretion of the court having the insolvency proceeding before it.

Under this view of the law, the proofs submitted made a *prima facie* case, and the respondents should have been put upon their defense. Of course, the respondents may take issue upon these proofs. They may show, if they can, that they are not stockholders of the bank, or not stockholders for so large an amount as alleged; they may show a release, a payment, or, in fact any other defense personal to themselves, or either of them; they are estopped only from questioning such orders made by the court having the insolvency proceedings before it as were within its proper jurisdiction.

One other question remains to be noticed. It is urged

there is no community liability, and the judgment should be sustained as to the respondent Martha E. Adair. This question is determined against the respondents by the decisions of this court in *Horton v. Donohoe Kelly Banking Co.*, 15 Wash. 399 (46 Pac. 409), and *Allen v. Chambers*, 22 Wash. 304 (60 Pac. 1128), and it is unnecessary to repeat the argument here.

The judgment appealed from is reversed, and the cause remanded for a new trial.

REAVIS, C. J., and DUNBAR and ANDERS, JJ., concur.

[No. 3589. Decided March 30, 1901.]

H. N. BELT, *Respondent*, v. WASHINGTON WATER POWER
COMPANY, *Appellant*.

PRINCIPAL AND AGENT — UNDISCLOSED PRINCIPAL — PLEADING.

In an action against an undisclosed principal the complaint is not demurrable on the ground that it nowhere alleges that the agent was acting for an undisclosed principal, when in one paragraph it sets up the contract with the agent upon which the action is based, and in a subsequent paragraph alleges that the contract was executed by such agent for and on behalf of the defendant; that the agreements therein contained to be performed by said agent were in fact to be done by the defendant; that the defendant had repeatedly recognized the contract as binding upon it, and had repeatedly promised to carry out the terms thereof.

SAME — WRITTEN AGREEMENT BY AGENT — PAROL EVIDENCE.

Oral testimony is admissible for the purpose of showing that an undisclosed principal was actually a party to a written agreement.

SAME — ACTION AGAINST PRINCIPAL AND AGENT JOINTLY — MISJOINDER.

Conceding that a joint action against an alleged agent and his undisclosed principal may be a misjoinder of causes of action, yet where the alleged agent was dismissed from the case in response to a demurrer, and the action proceeded against

the alleged principal alone, with the acquiescence of plaintiff, the error, if any, was cured by the action of the court and parties.

BREACH OF CONTRACT — MEASURE OF DAMAGES.

In an action to recover damages for breach of contract to construct and operate an electric railway, an allegation that plaintiff was the owner of a large amount of real estate, laid off into lots and blocks, and suitable only for suburban residences, that, as defendant well knew, his purpose in entering into the contract was to increase their value and make them available as city property; and that the difference in value between such property with and without said extension was \$25,000, is a sufficient allegation of the measure of damages to which plaintiff is entitled, since the proper measure of damages is the difference between the value of the land if the contract had been carried out, and its value with the contract unfulfilled.

SAME — PLEADING — ALLEGATION OF NON-PAYMENT.

In an action to recover damages, an allegation of the damages sustained, together with a prayer for judgment thereon, is sufficient as an allegation of the non-payment of the damages.

PARTIES — BREACH OF CONTRACT FOR ENHANCEMENT OF VALUE OF COMMUNITY REALTY.

The husband being charged by statute with the management and control of community property, the wife is not a necessary party to an action for breach of a contract made by the husband, which, if performed by defendant, would have been instrumental in increasing the value of their community realty.

ESTOPPEL — ELECTION OF REMEDIES.

The fact that, in an attempt to collect the damages now sought to be recovered, defendant had been sued upon a bond which it had given as security for the contract now in controversy, and that the suit had been decided in defendant's favor, because the provision in relation to unliquidated damages had not been authorized, would not estop plaintiff from pursuing another proper and effective legal remedy.

Appeal from Superior Court, Spokane County.—Hon. A. G. KELLIAM, Judge pro tem. Affirmed.

Stephens & Bunn, for appellant.

W. J. Thayer and *Graves & Graves*, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The complaint in this case alleges the corporate existence of the Washington Water Power Company, the defendant, with power to purchase stock in street railway corporations. That prior to the 31st day of February, 1892, the plaintiff, together with certain other parties, was the owner of stock in a certain corporation known as the Ross Park Street Railway Company. That on the 30th day of May, 1890, the Ross Park Street Railway Company entered into a contract in writing with the plaintiff and certain other parties, wherein it was recited that at the time of the incorporation of the Ross Park Street Railway Company it had been understood and agreed between the stockholders thereof and the parties of the second part that the object and purpose of said corporation was to construct and operate an electric street railroad over certain streets, named in the complaint, in the city of Spokane. That the agreement recited that the parties of the second part subscribed and paid for their shares in the capital stock of the corporation under such understanding and agreement and for such purpose, and not otherwise, and, for the purpose of carrying out said agreement, at a meeting of the stockholders of the said corporation duly held on the 27th day of May, 1890, a resolution had been duly passed directing the trustees of said corporation to cause said road to be constructed, to enter into a contract with the parties of the second part binding said corporation to construct said road, etc. That the said contract was well known to the defendants at the time of making the subsequent contract upon which this action is based. That the subsequent contract was

entered into on the 3d day of February, 1892, between W. S. Norman, of Spokane county, party of the first part, and Horatio N. Belt, Cyrus R. Burns, Sylvester Heath, and others, parties of the second part. This agreement was to the effect that the parties of the second part were to deliver to the parties of the first part five hundred and thirty-four shares of stock of the said Ross Park Street Railway Company. That the party of the first part, for and in consideration of the delivery of said stock, agreed to guarantee and save harmless the said parties of the second part from any and all indebtedness and obligations of the said Ross Park Street Railway Company, to undertake the maintenance and operation of said Ross Park Street Railway Company as it is now constructed and operated in a first class manner, and give a twenty minutes' service over said road during said period of five years, at a stipulated fare; to put in operation on or before the first day of May, 1892 certain extensions mentioned in the agreement, to be built and equipped in a first class and substantial manner. That certain other extensions were to be built and equipped within one year if the Ross Park syndicate demanded their building within that time, but, if not, within two years from the date of the agreement. The party of the first part agreed to give a bond to the party of the second part in the sum of \$30,000 for the performance of the contract. It is alleged that this contract was duly executed and delivered; that since the execution of the contract, R. W. Forrest, a party thereto, has died, and the defendants Burns, Heath, Wolverton, Webster, Kaufman, and Conlan have all declined to join as co-plaintiffs with this plaintiff in the suit, and are therefore made defendants; that the contract was executed by defendant Norman for and on behalf of the defendant the Washington Water Power

Company; that the company had recognized the contract, and promised to carry out its conditions; that the company did perform a portion of the conditions of the contract, but failed to perform them all; that at the time of making the aforesaid contract and the contract with the Ross Park Street Railway Company, the plaintiff was the owner of a large amount of real estate suitable for and only for suburban residences, which was laid off in lots, blocks, streets, and alleys and duly dedicated, and it was for the purpose of benefiting these lots and increasing their value and making them available as city property that the contract was entered into; that this purpose was well known to the defendants Norman and the water power company; that the difference in value between the property owned by plaintiff with and without said extension was \$25,000. For a second case of action plaintiff alleges the assignment of the claim of Kaufman to the plaintiff, and prays judgment for the sum of \$50,000. A demurrer was interposed by the defendants to the complaint, because it did not state facts sufficient to constitute a cause of action against either of them, and because there was a misjoinder of defendants and misjoinder of causes of action. On behalf of Norman the demurrer was sustained, and overruled as to the Washington Water Power Company. The defendants Webster, Burns, Kaufman, Wolverton, Conlan, and Heath answered that they had assigned whatever rights they had, if any, to the defendant, the Washington Water Power Company, and were dismissed from the action. The defendant company then answered, alleging that the plaintiff ought to be estopped to maintain this action because he had accepted Norman as principal in the alleged contract, and that the Washington Water Power Company should be joined only as a surety; that all the matters and things in plaintiff's

complaint had been theretofore adjudicated in the suit of *L. S. Roberts v. Washington Water Power Company et al.*, heretofore decided in the superior court of Spokane county and the supreme court of the state (19 Wash. 392, 53 Pac. 664); that in and to all things done or suffered by the defendant, plaintiff, with full knowledge of the facts, acquiesced and consented; that the plaintiff was barred by the statute of limitations; and asked that the cause be dismissed. There was a general reply. Upon the trial of the cause verdict was rendered in favor of the plaintiff in the sum of \$21,016. Judgment was entered on the verdict and appeal taken.

Error is assigned in overruling appellant's demurrer to the complaint. It is contended that the complaint nowhere alleges that Norman was acting for an undisclosed principal. It is true that the contract set forth in paragraph 4 of the complaint shows on its face that Norman, the party of the first part, was acting as principal in the transaction; but paragraph 6 makes the plain statement that said contract was executed by defendant W. S. Norman for and on behalf of defendant the Washington Water Power Company. It would seem that this was a plain statement that Norman was acting as an agent for the principal, who was not disclosed by the agreement set forth in paragraph 4. Paragraph 6 continues to the effect, that the undertakings and agreements therein contained to be performed and done by the said Norman were in fact to be performed and done by the defendant, the Washington Water Power Company; that the stock mentioned in the agreement was afterwards delivered to and received by the said Washington Water Power Company, and that it was then held and owned by said company; that the water power company had repeatedly recognized the contract as binding upon it, and had repeatedly promised to carry out the terms of the contract. We hardly

see how the language could be more explicit if it was the intention to charge the water power company with being the principal in this contract. But it is said that the allegations of the complaint make the contract that of Norman alone, and that it was not proper to allow any oral evidence to vary the written instrument. *Shuey v. Adair*, 18 Wash. 188 (51 Pac. 388, 39 L. R. A. 473, 63 Am. St. Rep. 879), is relied upon to sustain this contention. In that case it was held simply that oral evidence would not be allowed to be introduced by the maker of a promissory note, for the purpose of escaping responsibility himself, to show that he executed the promissory note in his own name as agent of another, though that fact were known to the payee at the time of the transaction. But that is a different proposition from the one under discussion, where the oral testimony is admitted for the purpose of showing that some one who is not disclosed by the agreement was actually a party to it. The court, in *Shuey v. Adair* could not have intended to lay down the rule as applicable to the case here, for it quoted from § 449, Mechem on Agency, on the question of the admissibility of parol evidence to show intent, as follows:

“But although parol evidence may not be admissible to release the agent, it may be made use of to charge the principal. Thus the principal, as will be seen hereafter, may be charged as such by parol evidence upon a simple contract made by his agent, even though the contract gives no indication on its face of an intention to charge any other person than the signer. And this doctrine applies as well to those contracts which are required to be in writing as to those to whose validity a writing is not essential. This rule is not obnoxious to the principle which forbids the contradiction of written instruments by parol testimony, for the effect is not to show that the person appearing to be bound is not bound, but to show that some other person is bound also.”

The rule is announced by Pomeroy on Contracts, § 89, as follows:

“When the agreement is executed by an agent in his own name, he appearing to be the contracting party, the requisite as to parties is complied with. The principal may maintain a suit and enforce the contract, and it is immaterial whether the principal was actually known during the transactions, or whether the other party supposed that he was dealing with the agent personally, entirely on his own behalf. Under the same circumstances, it is now the rule that a suit may be maintained, and the contract enforced against the principal, even though his name nowhere appears on the face of the writing, and even though he was undisclosed and unknown to the other party at the time of entering into the agreement, provided, of course, it was actually made on his behalf.”

This rule, indeed, seems to be so well established that the citation of further authority is not necessary.

The next contention is that there is no allegation that the alleged damages have not been paid, but we think the complaint sufficiently indicates that the damages have not been paid.

It is next insisted that an alleged agent and alleged principal cannot be sued together, and that, therefore, there is a misjoinder of causes of action. But, whatever the weight of authority may be on this proposition, a demurrer was filed in this case, and in response to that demurrer the defendant Norman was dismissed out of the case, and the cause proceeded against the water power company alone. This action of the court was acquiesced in by the respondent, and the effect is the same as though the respondent had voluntarily dismissed the defendant Norman, and no injury has thereby been done to the defendant the water power company in that regard.

It is also insisted that the complaint failed to allege anything showing measure of damages. But we think the

measure of damages was distinctly stated, and the proper measure of damages was the difference between the value of the land if the contract had been carried out and its value with the contract unfulfilled.

It is also alleged that there is a defect of parties plaintiff in that the assignment of Kaufman to respondent, Belt, was not good without joinder with his wife therein; and *Parke v. Seattle*, 8 Wash. 78 (35 Pac. 594), and *Lownsdale v. Gray's Harbor Boom Co.*, 21 Wash. 542 (58 Pac. 663), are cited to sustain this contention. But we do not think the cases cited reach that far. This action will in no wise imperil Mrs. Kaufman's right to her community interest in the land, if she has any. The action is upon the personal contract made by Kaufman, and the value of the land is incidental. The right of Kaufman to maintain the action would fall within the right which the statute gives him to manage and control the community property. This also disposes of the objection that the court erred in overruling the appellant's objection to the introduction of any evidence at the commencement of the trial.

It is insisted that the court erred in admitting in evidence the instrument sued on, for the following reasons: (1) Because it is not alleged in the complaint that it was ever delivered; (2) because plaintiff did not prove that it was ever delivered; (3) because the minutes of the meeting of the board of trustees show conclusively that appellant never agreed to become bound by it; (4) because the liability of appellant was fixed by resolution; (5) because Norman had no authority to bind appellant; (6) because appellant never acted under it and never ratified it; (7) because respondent elected to and did accept Norman as principal and appellant as surety; (8) because the instrument sued on, if ever delivered, was surrendered and

canceled; (9) because the stock was not delivered under it, and nothing was done in pursuance of it. We think, in the first place, that the complaint sufficiently alleges delivery, and that the proof sustains the allegations. Most of these objections are more or less dependent upon the testimony, which we will notice hereafter. As a legal proposition, however, it is urged that the plaintiff was estopped from prosecuting this action, because in the case of *Roberts v. Washington Water Power Company*, 19 Wash. 392 (53 Pac. 664), the record of which was offered in this case, and is brought up here, an attempt was made to collect these damages by suing on a bond which the water power company had furnished as surety on the contract which is sued upon now. That cause failed in the court below and here for the reason that the provision in relation to the unliquidated damages was not authorized; and several cases from this court are cited to sustain the doctrine of estoppel for that reason, but we do not think that any of them are in point.

But, in addition to the outside authorities which are to the effect that a party will not be estopped from pursuing his proper and legal remedy because he has made a mistake in attempting to enforce a remedy which he did not have, this court has decided the question squarely in the case of *Magnus v. Woolery*, 14 Wash. 43 (44 Pac. 130), where it was held that the fact that the obligee in a re-delivery bond elects to sue thereon in the first instance will not preclude a subsequent action by him against the sheriff for damages, when it develops that the bond which the sheriff had taken and turned over to him was not in fact a genuine one. On the question of interest, see *Bellingham Bay, etc., R. R. Co. v. Strand*, 14 Wash. 144 (44 Pac. 140). We think it sufficiently appears from the record that the deeds which were given by Belt in this case to

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a portion of the land in question were intended as mortgages.

Many objections are made also to the instructions in this case, which are too lengthy to notice specially, and many lengthy instructions were presented. Error is alleged in the giving of nearly all of the instructions and in the refusing to give the instructions asked by the appellant. The most of the errors are based upon the insufficiency of the evidence to justify the instructions. We have examined in detail the extended and earnest briefs, both in chief and in reply, filed by the appellant, and the authorities there cited. We have also read the voluminous testimony in this case. Want of time prevents us from answering in detail all the arguments presented therein, and from reviewing specially the authorities or the testimony in detail. The record convinces us that there was not only sufficient testimony to sustain the instructions given by the court and the verdict of the jury, but it is convincing to us that the appellant, the Washington Water Power Company, was the real party in interest to the contract set forth in the complaint; and, there having been no prejudicial error committed by the court in giving or refusing instructions, or in the admission or denial of testimony, and there having been sufficient testimony to sustain the verdict so far as the amount of the damages is concerned, the judgment will be affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3788. Decided March 30, 1901.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK
GOTTFREEDSON, *Appellant*.

CRIMINAL LAW — SUFFICIENCY OF INFORMATION — DATE OF OF-
FENSE.

The failure to allege the exact date of the commission of a crime is not ground of demurrer against an information, where a date within the statute of limitations is alleged as the time of its commission.

SAME — DEFENDANT AS WITNESS — FORMER CONVICTION.

In a prosecution for horse stealing, it is error to compel defendant, who had offered himself as a witness, to testify that he had once before been convicted of horse stealing, since the tendency of such testimony would be to prejudice the jury, and the demands of the statute permitting conviction of a crime to be shown to affect the credibility of a person offered as a witness are met by proof of the conviction, without unnecessary parade before the jury that defendant had at one time been guilty of the exact crime for which he is at the time on trial.

SAME — EVIDENCE — SIMILAR OFFENSE.

In a prosecution of defendant for horse stealing, it is error to admit testimony showing that he had stolen another horse at about the same time with the one for whose theft he was standing trial, where the two transactions are not so woven together as to constitute interdependent crimes, but the sole effect of the testimony would be to establish the bad character of defendant and prejudice the jury against him.

Appeal from Superior Court, Okanogan County.—Hon.
CHARLES H. NEAL, Judge. Reversed.

Edward B. Simmons, for appellant.

A. W. Barry, Prosecuting Attorney, for the State.

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Mar. 1901.] Opinion of the Court—DUNBAR, J.

The opinion of the court was delivered by

DUNBAR, J.—Appellant was informed against for horse stealing in Okanogan county. The part of the information which it is necessary to review is as follows:

“Frank Gottfreedson is hereby accused by A. W. Barry, prosecuting attorney in and for Okanogan county, state of Washington, in the name and by the authority of the state of Washington, and on oath by this information, of the crime of horse stealing committed as follows, to wit: That on the day of, 1899, and within three years next before the filing of this information,” etc.

A demurrer was interposed to the information for the reason that it did not substantially conform to the requirements of the Code and that the facts charged did not constitute a crime. The demurrer was overruled and the order of the court overruling the demurrer is the first alleged error; the contention being that no sufficient date was alleged. We think the information is sufficient if the time is alleged at any time within the statute of limitations. The insertion of a definite date, however, or a date as definite as could be ascertained by the pleader, would be a better practice, and would accord fairer treatment to the defendant.

We think, however, the court erred in compelling the defendant, who offered himself as a witness, to testify that he had been convicted of horse stealing. The statute provides that no person offered as a witness shall be excluded from giving evidence by reason of the conviction of a crime, but such conviction may be shown to affect his credibility. When it was shown that the defendant had been convicted of a crime, the demands of the statute had been met; for the purpose of the statute is only to affect the credibility of the witness, and not to prejudice the minds of the jury by parading before them

the fact that the witness had been guilty of the exact crime for which he was then on trial. The tendency of such testimony as that on the minds of the jury would not be so much to affect the witness's credibility as to cause the jury to conclude that, because he had before been convicted of horse stealing, the probabilities were that he was guilty of stealing the horse in question. Upon this same line, the state introduced testimony tending to show that the defendant in this case had stolen another horse at the same time he is alleged to have stolen the one for which he was standing his trial. It appears that, at the time the horse which the defendant was charged with stealing was turned out on the range, another horse, owned by one Proebstal, was turned out, which was afterwards traced into the possession of the defendant; and the prosecuting attorney, in his statement, told the jury that he would show that the horse mentioned in the information and the one belonging to Proebstal were both turned out on the public range together, and that they were both later found, the Proebstal horse in the possession of the defendant, the Errickson horse (the one described in the information) in the possession of one Carson, who had secured the same from the defendant; both said horses having been stolen by defendant and taken to Ferry county, Washington. Witness McClure, among other things, testified as follows:

"On my return with the mare I saw defendant at Curlew ferry and told him I had replevined her. He said he got her from a man, I do not now remember who it was he said he got her from. He said he traded two pack horses for the Proebstal horse.

Mr. Simmons: We object to any statement as to the Proebstal horse, and move the court to strike out that part of the statement on the ground that the same is irrelevant, improper and immaterial, and is an attempt to prove a different alleged offense than the one set forth in the information, and for which we are being tried.

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The Court: Motion denied.

Mr. Simmons: We except.

Mr. Barry: Did he, defendant, say anything about the value of the Proebstal horse?

Mr. Simmons: We object upon the same grounds as before stated.

The Court: He may answer.

Witness: He said he had been offered \$125 for the Proebstal horse.

Mr. Simmons: We except.

Witness: He made no objection to our taking it along. He told us where he got it, but I do not now remember. He said he traded two pack horses for it, the Proebstal horse, and took a bill of sale of it.

Mr. Simmons: Same objection as to all of these statements relative to the Proebstal horse, and we move to strike the same out, and that the court instruct the jury not to consider them.

The Court: They may stand.

Mr. Simmons: Exception."

The same character of testimony was reiterated by witness Patterson, over the objections of the defendant, and also by the witness Proebstal. The general rule is well established that proof of the commission of a separate and distinct crime will not be admitted for the purpose of aiding the conviction of defendant for the crime charged. There are exceptions, however, to this general rule, as where the testimony shows a connection between the transaction under investigation and some other transaction, and where they are so interwoven that the omission of the testimony in relation to the other crime would detract something from the testimony which the state would have a right to introduce as tending to show the commission of the crime charged by the defendant, or where it is apparent that the parties had a common purpose in the transaction of both crimes, or where the testimony tending to show the commission of one crime tends to prove a condition of mind which must necessarily be entertained by the de-

fendant in the commission of the crime charged; as, for instance, in *Commonwealth v. McCarthy*, 119 Mass. 354, it was held that on an indictment for the malicious burning of a building on September 10, 1875, it was competent for the government to show, on the question of the intent with which the defendant burned the building on that day (the building having been insured), that on August 24 and on September 6, 1875, the defendant set fire to a shed, which was not insured, ten feet distant from the building, and connected therewith by a flight of steps. In *State v. Baker*, 23 Ore. 441 (32 Pac. 161), it was held that on a trial for stealing a mare it was admissible to prove that on the same night on which the stealing occurred another mare was stolen from neighbors of the person who owned the mare alleged to have been stolen, for the reason that under the circumstances of that case it was impracticable to trace defendants' connection with the mare described in the indictment, from the time it was stolen until their arrest, without discussing the commission of the other crimes. And, generally, we think that proof of interdependent crimes is admissible. But the rule has never been laid down that interdependent crimes may be proven, the only effect of which would be to establish the bad character of the defendant, and create prejudice in the minds of the jurors against him because he was unable to meet and successfully defend against charges which he had no notice of, and could not have, in the very nature of things, been prepared to defend against. In other words, there is no system of jurisprudence which would allow a person to be convicted of one crime because he was shown upon the trial to be guilty of another.

In *Jordan v. Osgood*, 109 Mass. 457 (12 Am. Rep. 731), at the trial of an action which presented the issue whether the defendant obtained goods from the plaintiff by fraudulent representations, and also the issue whether

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he obtained the goods intending at the time not to pay for them, it was held that evidence of other frauds committed by the defendant about the time of obtaining the goods and making the alleged representation was not admissible upon either issue, unless it appeared that such frauds and the obtaining of the goods in question were parts of one fraudulent scheme committed in the pursuance of a common purpose. In that case the court said:

“The fact that a defendant has committed a similar but distinct crime or fraud is not competent to prove that he committed the particular crime or fraud with which he is charged. It has no tendency to prove the proposition to be established by the plaintiffs, but is equally consistent with an affirmative or negative decision of that proposition. The effect of such proof may be to produce such a state of mind in the jury to whom it is addressed, that a less weight of testimony satisfies them than would otherwise be necessary to produce conviction, but it does not directly tend to prove or disprove the matter in dispute. The admission of such evidence would introduce a multiplicity of collateral issues, calculated to withdraw the attention of the jury from the real issue in the case; and it would operate unjustly to the defendant, as it requires him to explain his transactions with others, without any notice or opportunity for preparation.”

These remarks of the learned court apply with great force to the case at bar. The testimony furnished by the state was of the most meager kind, and it may be seriously doubted whether the jury would have found sufficient testimony to have convicted the defendant of the crime charged had not the testimony been adduced in relation to his transactions with the Proebstal horse,—transactions which, if he had had an opportunity to have explained, might have presented a different bearing. In any event, it is not the policy of the law to allow a citizen to be convicted of a crime unless that particular crime is proven.

In *People v. Schweitzer*, 23 Mich. 301, it was said by Judge CHRISTIANCY, who delivered the opinion of the court:

"We see no legal ground upon which the witness, Dumphy, could have been allowed to testify to the commission by the defendant of another and distinct larceny from that for which he was on trial. The general rule is well settled that the prosecution are not allowed to prove the commission of another and distinct offense, though of the same kind with that charged, for the purpose of rendering it more probable in the minds of the jury that he committed the offense for which he is on trial; and this would be the natural and inevitable effect upon the minds of the jury, of the admission of such evidence, on whatever ground or pretense it might be admitted; and the defendant would thus be prejudiced on the trial of the offense charged, by proof which he has no reason to anticipate, of an offense for which he is not on trial, and to which, when properly called upon to defend, he may have a perfect defense."

At the trial of an indictment for obtaining the property of another by false pretenses in the sale of a horse, evidence of similar pretenses in sales to other persons a short time previously to the sale in question was inadmissible for the purpose of showing the intent with which he made the sale of the horse. *Commonwealth v. Jackson*, 132 Mass. 16. See, also, *State v. Thompson*, 14 Wash. 285 (44 Pac. 533); *State v. Bokien*, 14 Wash. 403 (44 Pac. 889).

In the last mentioned case it was held, in a prosecution for obtaining goods under false pretenses in the giving of a check upon a bank in which the defendant had no funds, that it was error to allow the prosecution to introduce testimony of other checks having been given by defendant to other persons, when he had no funds on deposit. In this case the matters testified to were collateral and irrelevant to the issues, in no way tended to establish

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the guilt of the defendant, but did tend to inflame the minds of the jurors against the defendant to his prejudice; and it was, therefore, reversible error.

There are other allegations of error in appellant's brief, but, as upon a re-trial of the cause these will probably not occur again, we do not find it necessary to express any opinion upon them. But, for the errors reviewed, the judgment will be reversed and a new trial granted.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3800. Decided March 30, 1901.]

WASHINGTON DREDGING & IMPROVEMENT COMPANY, Respondent, v. GEORGE KINNENAR et al., Appellants.

LIS PENDENS — UNLAWFUL FILING — CANCELLATION — APPEALABLE ORDER.

A *lis pendens* notice can properly be filed only when there is an action pending involving the land covered by the notice, and the filing of such notice by one of the parties to an action after it has been determined against him constitutes a cloud upon his adversary's title, which he has a right to have removed; hence an order of the court refusing to act upon his motion for its cancellation is an order affecting a substantial right and therefore appealable.

Appeal from Superior Court, King County.—Hon. JESSE P. HOUSER, Judge. Reversed.

Ballinger, Ronald & Battle and *Fred Rice Rowell*, for appellants.

The opinion of the court was delivered by

DUNBAR, J.—Original contest over application for tide lands. Contest decided against respondent by the board of state land commissioners on February 7, 1898. The

respondent appealed from the rejection of its application for tide lands to the superior court of King county. Appellants moved to dismiss said appeal, which motion was sustained on October 25, 1898. From the order of the court granting the dismissal the respondent appealed to this court, which said appeal was dismissed on May 18, 1899. Thereafter the respondent applied to the superior court of King county, asking that the said cause be re-docketed and retried, and from the order of the court refusing said application the respondent again appealed to this court, which appeal also was dismissed by this court on the 26th day of June, 1900. Thereafter, and on April 30, 1900, for the first time, the respondent filed its *lis pendens*, which was properly recorded in the records of King county. Thereupon the appellants filed a motion asking for the cancellation of said *lis pendens* in the manner provided by law. The notice of the motion was served upon the respondent, and upon the hearing of the same the motion was denied. It clearly appears from the statement above set forth that no action was pending in the superior court of King county, or in any court whatever, between the parties to this action, at the time the *lis pendens* was filed. A *lis pendens* is for the purpose of giving notice of the jurisdiction or control which the court acquires over property involved in a suit pending the continuance of the action. The matters in dispute having been finally determined, not only once, but twice, the filing of the *lis pendens* was without authority of law, and the only question that can be involved in this case is whether or not the order of the court in refusing to grant the appellants' application is an appealable order.

The latter part of § 4887, Bal. Code,—a section in relation to *lis pendens*,—provides:

“And the court in which the said action was commenced

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Syllabus.

may, in its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled of record, in whole or in part, by the county auditor of any county in whose office the same may have been filed or recorded, and such cancellation shall be made by an indorsement to that effect on the margin of the record."

The *lis pendens* is evidently viewed by the law as a cloud on the title to land which it describes. The appellants have an undoubted right to have that cloud removed. The order of the court refusing to remove it is an order affecting their substantial rights, and is therefore appealable.

The judgment will be reversed, and the cause remanded, with instructions to order the *lis pendens* canceled in the manner prescribed by § 4887, *supra*.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3804. Decided March 30, 1901.]

DAVID MATHESON *et ux.*, Appellants, v. WILLIAM WARD
et al., Respondents.

WATERS AND WATER COURSES — DIVERSION — EFFECT OF ACQUIESCENCE.

The acquiescence by riparian proprietors for a period of thirty years in the diversion of a stream from its natural channel into a new one is binding to such an extent as to prevent their lawfully returning the stream to its old channel, when new rights have accrued by reason of such long continued divergence.

COST BILL — WHEN MAY BE STRICKEN.

Where the party in whose favor judgment is rendered neglects for more than ten days to file his cost bill with the clerk, as required by Bal. Code, § 5173, the adverse party is entitled to have the cost bill stricken as to all items except such fees as appear upon the face of the papers.

VENUE—WHERE FINDINGS MAY BE SIGNED.

Although it is necessary under the statutes, that the trial of an action must be had in the proper county, yet there is no law requiring the judge who tried the case to sign the findings and judgment in the county where it is pending.

Appeal from Superior Court, Clallam County.—Hon. OLIVER V. LINN, Judge. Affirmed.

George C. Hatch, for appellants.

Allen Weir and *W. E. Humphrey*, for respondents.

The opinion of the court was delivered by

MOUNT, J.—The Dungeness river rises in the Olympic mountains, and flows in a northerly course through Clallam county into the Straits of Fuca. It is a rapid stream, and at time of freshets, which occur semi-annually, frequently overflows its banks, and floods the surrounding low land, and does great damage to cultivated lands. Especially is this true near its mouth. About four miles south of its mouth, at a place known as "Potter's crossing," the river forks into three branches. The east branch is known as "Hurd's creek channel," the central or main branch being known as the "east channel," and the one further west as the "west channel." Neither plaintiffs nor defendants own any of the land at these forks, nor within one or two miles thereof, but all own lands further to the north, which are subject to the overflow at times of high water; plaintiffs' land being some two miles from these forks, and along Hurd's creek channel, east of the main channel, and defendants' lands being about the same distance north, and on the west side of the main channel. Some time prior to the year 1865 one Le Balister built a wing dam somewhere near Potter's crossing, and about opposite the head of Hurd's creek channel, which diverted all the flow of water into the east channel and Hurd's creek channel, so

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that for a period of thirty years no water ran into the west channel, except probably at times some seepage; and this west channel thereby became obliterated as an active channel, and near its head trees and brush grew in the same, and banks were formed, so that no water ran out of the river into this channel excepting during very high water. In 1895 the owners of lands on the east side of said river and on Hurd's creek channel some two miles north of Potter's crossing, without the knowledge of those living on the west side, excavated at or near said crossing, which is the place at which the river forks as aforesaid, a channel of from ten to forty feet wide, from two to four feet deep, and forty to one hundred and twenty feet in length, and placed a wing dam in the main channel so that thereafter almost the entire stream was thereby diverted from Hurd's creek channel and the east channel into the west channel. At times of high water the lowlands, including the lands of defendants, were flooded and badly damaged thereby. In January, 1900, defendants, who own lands along and near this west channel to the north, attempted to clear out the drift wood and debris at and near the forks as aforesaid, in the east channel, and to close up the west channel, and thereby turn the water again into Hurd's creek and the east channels. This action was brought by plaintiffs to restrain defendants from so doing. After a trial by the lower court, and findings in favor of the defendants, and judgment dismissing the complaint and giving defendants affirmative relief, plaintiffs appealed.

It is admitted in the cause that the Hurd's creek channel and the east channel are natural channels, in which the waters of the Dungeness river have been accustomed to flow from time immemorial. It is also admitted that from 1865 down to 1895 no water flowed in the west channel ex-

cept a seepage, and at extreme high water when the Dungeness river overflows its banks. It is also admitted that in 1895 an excavation was made by the persons living on Hurd's creek on the west side, so that at the time of the trial the principal flow was in the west channel. As stated by appellants, the whole cause turns on the question whether the west channel was an artificial channel or not. Much evidence is quoted by appellants in their brief to the effect that many years ago there was a natural channel in the west, and that one Le Balister, in 1865, closed up this channel by a dam, and that thereafter it filled up by sediment and brush, and no water ran through it at low and ordinary high water. Conceding this to be true, viz., that prior to 1865 it was a natural channel, although the evidence is conflicting upon this point, the admissions already stated make the determination of the question one of law for the court, rather than one of fact. Even if the west channel was a natural channel prior to 1865 and was then dammed up, and the water diverted to the east and Hurd's creek channels, where it was confined for thirty years, and this flow was acquiesced in by the riparian owners and others along the channels of said river, this would make the east and Hurd's creek the natural channels; and defendants and others purchasing and improving lands along the old channel, and relying upon the flow continuing in the channels thereby formed, could not now have their lands damaged by reason of the water being turned back by artificial means after that lapse of time. After the lapse of thirty years the channels known as the "east" and "Hurd's creek" became natural channels, and the attempt of riparian or other owners to change the flow at this late day to the injury of persons on the old channel would be unlawful. According to the evidence it is probably true that in the year 1865 one Le Balister, by means

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of a dam or embankment, changed the flow of water out of the west channel. Conceding it to be so, the acquiescence by plaintiffs and their grantors and all riparian owners below the point of divergence for a period of thirty years has now lost them the right to change the flow from the new into the old channel. 28 Am. & Eng. Enc. Law, 964; *Woodbury v. Short*, 17 Vt. 387 (44 Am. Dec. 344); *Ford v. Whitlock*, 27 Vt. 265; Angell, *Water Courses* (7th ed.), § 108h.

Gould on *Waters* (2d ed.), at § 159, says:

“When a stream flowing through a person’s land is diverted into a new channel, either artificially or by sudden flood, affecting the rights of other riparian proprietors favorably, and the owner acquiesces in the new state of the stream for so long a time that new rights accrue, or may be presumed to have accrued, such acquiescence is binding, like a public dedication, and the stream cannot be lawfully returned to its former channel.”

No doubt the plaintiffs, within a reasonable time after such diversion, could have removed the obstruction placed across the west channel by Le Balister; but when, after thirty years, they undertook to do so by virtually making a new channel, they were invading the rights of those below who had purchased lands and improved the same. Hurd’s creek and east channels having become the natural channels defendants had the right to the natural flow through the same. Likewise, if the west channel had been opened without consent of the lower owners by artificial means, and these lower owners thereby suffered injury to their lands which were under cultivation, by reason of the flood which would not naturally flow over their lands, they might replace the embankments, and restrain plaintiffs from interfering with the same. Angell, *Water Courses* (7th ed.), §§ 333, 334, 428, 429; Gould, *Waters*, § 412; *Mathewson v. Hoffman*, 77 Mich. 420 (43 N. W. 883, 6

L. R. A. 349); *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528.

We have carefully examined the record, and are convinced that the findings of the lower court are correct, and in accordance with the weight of the evidence.

Judgment in this case was entered on May 29, 1900, and on June 16th a cost bill was filed. Plaintiffs thereupon moved to strike the said cost bill, because the same was not filed within time, which motion was denied. This was error. The Code provides (§ 5173, Bal. Code) that this all the items of the cost bill except the items named above, cost bill "shall be filed with the clerk of the court within ten days after the judgment." Counsel for defendants seek to overcome this provision of the statute by filing an affidavit which states, in substance, that counsel relied upon one of the defendants to furnish him the items therefor, and that defendant neglected so to do until the time had elapsed. Even if this showing were permissible, it is not sufficient. *Dow v. Ross*, 90 Cal. 562 (27 Pac. 409). The court should have sustained the motion as to all the items thereof except clerk's fees and all fees appearing on the face of the papers, which amounted to \$17.

The appellants also insist that the judge who tried this case, being called from another county, had no authority to sign the findings and judgment outside of Clallam county. There is no merit in this contention. While it is true that the trial must be had in the proper county (*State ex rel. Clark v. Neal*, 19 Wash. 642, 54 Pac. 31),

"It was not the signing but filing of the findings and order for judgment that determined the action. We are quite confident that there is no law that requires a judge to deliberate upon a case or to prepare his findings and order for judgment in the county in which the cause is pending." *Comstock Q. M. Co. v. Superior Court*, 57 Cal. 625.

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SyHabus.

The decree will be modified to the extent of striking out and in all other respects the decree is affirmed, with costs to the respondents.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3815. Decided March 30, 1901.]

LEWIS B. BIGNOLD, *as Receiver, Respondent*, v. H. WILLIS
CARR, *Appellant*.

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34	413
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DISMISSAL OF ACTION — FAILURE TO PROSECUTE — PENDENCY OF DEMURRER.

The refusal of the court to dismiss an action for want of prosecution is not error, while a demurrer to the complaint is pending and undetermined.

LIMITATIONS — SUSPENSION OF STATUTE — ABSENCE FROM STATE.

The running of the statute of limitations is suspended during such time as plaintiff is incapacitated from bringing his action by reason of the absence of the defendant from the state.

SAME — ACTION ON DEFICIENCY JUDGMENT — WHEN STATUTE COMMENCES TO RUN.

Where the entry of a deficiency judgment was made within six years of action thereon, it is not barred (conceding the six years' limitation is applicable to domestic judgments), although judgment of foreclosure upon which the deficiency judgment was based may have been entered more than six years prior to the commencement of action upon the deficiency judgment.

ACTION ON JUDGMENT — EVIDENCE — AUTHENTICATION OF RECORD.

The clerk of the court being the custodian of its records, according to the statutes, a judgment record offered in evidence, certified by the clerk, is sufficient without any certificate of the judge that the clerk is the custodian of the records.

SAME — JOINT JUDGMENT — ACTION AGAINST ONE DEBTOR.

Under the rule that action upon a joint judgment may be maintained against one of the judgment debtors alone, the introduction in evidence of a record showing a judgment against defendant and another, while the complaint states a cause of

action against defendant alone, does not constitute a failure of proof.

NON-JOINDER OF DEFENDANTS — TIMELINESS OF OBJECTION.

Where there is a defect of parties defendant, objection on that ground should be raised before trial in order to be available on appeal.

APPEAL — FINDINGS OBJECTIONABLE IN FORM — WAIVER OF ERROR.

Failure to except in the trial court to the form of the findings or conclusions of the court constitutes a waiver of error therein.

Appeal from Superior Court, King County.—Hon. JESSE P. HOUSER, Judge. Affirmed.

Byers & Byers, for appellant.

Hogan & Abel and *John Kelleher*, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This action was brought on August 8, 1898, in the superior court of Chehalis county, on a judgment which had been obtained by the Bank of Montesano against the appellant and others for the sum of \$2,615.57 and costs. The plaintiff in this case is receiver of the Bank of Montesano. A demurrer was interposed to the original complaint, which was sustained, and an amended complaint was filed. A demurrer was interposed to the amended complaint in the fall of 1898. No further steps were taken by the respondent, and in June, 1899, the appellant moved for a dismissal for failure to prosecute. The motion was denied, and renewed and denied in 1899, when the demurrer to the amended complaint was heard and overruled. The appellant then answered by a general denial, and the cause was tried. Judgment was rendered in favor of the respondent.

The refusal of the court to grant a dismissal of the action for failure to prosecute is alleged as error. We do

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not think this contention can be sustained. At the time these motions were made the case was pending upon an issue of law raised by appellant's demurrer to the amended complaint. It was within the power of the appellant to have noticed the demurrer for hearing, and it was as much to his interest to expedite the case by noticing the demurrer for argument as it was the plaintiff's to have the cause prosecuted to trial. In fact, the case could not be tried until the demurrer was disposed of.

The principal contention in this case is that the statute of limitations had run before the action was brought; more than six years having expired between July 21, 1892, and the commencement of this action on August 8, 1898. This contention, however, cannot be sustained, for two reasons: The first is that under the amended complaint it appears that for a period of one year next immediately preceding the commencement of the action the defendant was out of the state of Washington and absent therefrom, so that personal service of process could not be made upon him, and that, in addition to that, since the entry of the judgment, he had been absent from the state of Washington at intervals aggregating about two years in all. It is well established that the statute will not run during the time that the plaintiff was incapacitated from bringing the action by reason of the absence of the defendant. In the second place, the record shows and the court finds that, although judgment was entered on the 23d day of July, 1892, the judgment being a judgment of foreclosure, the mortgage which was foreclosed providing for the entry of a deficiency judgment, thereafter, after the sale of the property mortgaged, and upon the determination of the amount due on the deficiency judgment, to-wit, on the 10th day of September, 1892, a deficiency judgment in favor of the Bank of Montesano and against the defendant, H.

Willis Carr, was duly docketed and entered in the superior court of Chehalis county for the sum of \$1,713.15, with interest thereon at the rate of ten per cent. per annum from said September 10, 1892. This being the date of the entry of the deficiency judgment upon which this action was brought, the action was within six years from the entry of the judgment. This conclusion renders it unnecessary to determine the proposition of whether or not the six years statute of limitations applies to domestic judgments.

It is also insisted that the court erred in admitting the evidence offered to sustain the amended complaint, for the reason that the record was not authenticated according to law, and did not prove or tend to prove the allegations of the amended complaint; that the court erred in signing the findings of fact and conclusions of law, for the reason that the same were not separated as required by the statute, and in finding judgment for the respondent, for the reason that the same was not justified by the evidence and was contrary to law. The objections to the introduction of evidence seem to arise from the fact that the record was certified to by the clerk of the court, and that the judge had not certified that the clerk was the custodian of the records. We do not think that this is necessary. Under the statute the clerk is the custodian of the records, and his certificate of any record that is under his custody is sufficient.

The objection that the proofs do not support the allegations of the amended complaint because the evidence showed that the judgment was a joint one, is not material. In the first place, if there was a defect of parties defendant, the question should have been raised before the trial. In the second place, under the doctrine laid down in *Olson v. Veazie*, 9 Wash. 481 (37 Pac. 677, 43 Am. St. Rep. 855), an action upon a joint judgment may be maintained against one of the judgment debtors alone.

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The appellant cites *Ach v. Carter*, 21 Wash. 140 (57 Pac. 344), in support of the assignment of error that the court erred in failing to sign the findings of fact and conclusions of law separately; but, whatever may be said of the merits of this contention, the case cited by appellant will not aid him here, for the reason that that case holds that exceptions to the form of the findings or conclusions must be taken in the trial court, or be considered waived.

We think the action was brought in time, and that the proof was sufficient to sustain the judgment. The judgment is therefore affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3875. Decided March 30, 1901.]

THE STATE OF WASHINGTON *on the Relation of W. B. Stratton, Attorney General, Appellant, v. JOHN R. ROGERS et al., as the State Capitol Commission, Respondents.*

STATUTES — APPROPRIATION BILLS — TIME OF TAKING EFFECT.

The act of March 2, 1901 (Laws 1901, p. 54), entitled "an act providing for the purchase and completing and furnishing of a state capitol building, and providing for the payment of interest and making an appropriation," took effect immediately upon its passage and approval, since it must be construed as an appropriation bill, falling within the exception contained in art. 2, §31, of the state constitution, which declares that "no law, except appropriation bills, shall take effect until ninety days after the adjournment of the session," unless otherwise directed by the legislature in case of an emergency.

Appeal from Superior Court, Thurston County.—Hon. OLIVER V. LINN, Judge. Affirmed.

W. B. Stratton, pro se.

Frank C. Owings, for respondents.

PER CURIAM.—The attorney general made application to the superior court of Thurston county for a writ of prohibition against the state capitol commission prohibiting the commission from proceeding under the act entitled, "An act providing for the purchase and completing and furnishing of a state capitol building, and providing for the payment of interest and making an appropriation." (Laws 1901, p. 54). The affidavit for the writ alleges that the commission have met and organized without authority of law, and have sold the warrants in the sum of \$350,000 drawn on the state capitol building fund, pursuant to the appropriation made by law, upon the capitol building fund, and that the above act of March 2, 1901, contains no emergency clause, and therefore does not take effect until ninety days after the adjournment of the legislature. A demurrer was interposed to the affidavit upon the ground that it did not state facts sufficient to entitle the relator to any relief, which was sustained by the superior court, and judgment entered denying the writ. Relator appeals.

The only question presented by the record is the time that the act of March 2, 1901, takes effect. While not in terms, in essence the act is amendatory of the act approved March 21, 1893, entitled "An act to provide for the location and erection of a capitol building and providing an appropriation therefor, and declaring an emergency." Laws 1893, p. 462. Section 1 of the latter act creates the state capitol commission, and thereafter succeeding sections define its powers and duties. Section 5 and succeeding sections direct the location and construction of a capitol building in Olympia. Section 15 creates

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the fund known as the "capitol building fund," into which fund shall be paid the proceeds of all moneys derived from the sale of lands granted to the state of Washington for the purpose of erecting public buildings at the state capital, and appropriates directly for the two succeeding years \$500,000. The act of March 2, 1901, directs the capitol commission to proceed to the erection of the capitol building, and authorizes them to purchase from Thurston county the county court house and make additions thereto, and the grounds, providing limitation upon the price, and declares that the same shall be used as the capitol building of the state of Washington. Section 6 provides that in order to facilitate the sale of warrants and prevent sacrifice of the state lands donated by the general government for the purpose of erecting a capitol building, the state guarantees the interest on the warrants issued for the purchase, completing, and furnishing of the building at a rate not to exceed five per cent. per annum; and \$17,500 is appropriated out of the general fund for the purpose of paying the interest upon the warrants, such interest so paid to be returned after the payment of the principal sum of \$350,000 out of the capitol building fund, arising from the proceeds of the sale of granted lands. Section 8 directly appropriates out of the state capitol building fund for the purchase, completion, and furnishing of the capitol building the sum of \$350,000, and all the unexpended portion of the capitol building fund under the act of 1893 is repealed, and the latter appropriation is declared to stand in lieu of the unexpended appropriation made in the act of 1893.

The controversy requires construction of § 31, art. 2, of the constitution, which declares: "No law, except appropriation bills, shall take effect until ninety days after the adjournment of the session . . . unless in case

of an emergency . . . the legislature shall otherwise direct." In the arguments presented by counsel it is conceded that little judicial construction exists which is authority upon the point involved here. It seems a number of states have constitutions similar to the provision in ours; that is, specifying the time within which all acts of the legislature go into effect. In only a few of the states having such a prescription of time are there exceptions where any law has immediate effect from its approval, but some four of the state constitutions have been called to our attention which contain exceptions. That of Louisiana (art. 40) declares: "No law passed by the general assembly, except the general appropriation act, or act appropriating money for the expenses of the general assembly, shall take effect until promulgated." Missouri (§ 36, art. 4): "No law passed by the general assembly, except the general appropriation act, shall take effect." Kentucky (§ 55): "No act, except general appropriation bills." Texas (§ 39, art. 3): "No law passed by the legislature, except the general appropriation act." These constitutions are older than ours, and it is therefore fair to assume that in framing the constitution of Washington the limitation, "*general* appropriation bills," was intentionally omitted. At any rate the court would not be authorized to insert the word "general" in the constitution. The words must be accepted in their ordinary and common meaning here. It has been urged by relator that, if an unrestricted meaning be given to the word "appropriation," all bills providing for the appropriation of money, however incidental, are appropriation bills. But this may not necessarily be conceded. It is true that all general appropriation bills provide money for certain purposes, ordinarily for the expenses of the government and public institutions, and incidentally may provide for the appli-

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cation of the appropriation and specify the purchase of materials required in running the same, and how it shall be done; yet such incidental specifications do not deprive the appropriation bill of its nature as general. In the act under consideration the existing capitol commission, with matured powers to fully proceed to the erection of the capitol, has some different and additional duties imposed upon it. The original appropriation made for the capitol building fund created in 1893 upon the faith of the land granted to the state for the erection of public buildings is reduced from the unexpended portion of \$930,000 to the sum of \$350,000, and the interest on this sum is guaranteed until the payment of the principal out of the capitol building fund when the interest so expended from the general fund shall be returned to the state. We think a fair construction of the act shows it to be substantially an appropriation bill, and that it comes within the exception mentioned in art. 2, *supra*, of the constitution.

The judgment of the superior court is affirmed.

[No. 3239. Decided April 1, 1901.]

SECOND NATIONAL BANK OF COLFAX, *Appellant*, v. M. F. HATCH, *Respondent*.

FINDINGS BY COURT.—CONCLUSIONS.

Where a jury is waived in an action at law and the case is tried by the court, the findings of the court are equivalent to a verdict, and will not be interfered with, when there is evidence upon which to base the findings.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

T. O. Abbott, for appellant.

Corliss & McKay, for respondent.

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PER CURIAM.—This action is for the recovery of a certain boiler and for damages for its detention. The action was instituted in the superior court of King county. The plaintiff, appellant here, alleges in its complaint that it is the owner and entitled to the possession of a certain chattel known as a "marine boiler of the Smith & Watson make," and that, while it was in the peaceable possession thereof, the defendant, respondent here, without its consent or knowledge, took the said chattel into his possession and has since withheld the same. The answer denies the material allegations of the complaint and sets up two affirmative defenses, the first of which is that the boiler referred to is not a chattel but that it was, on the 5th day of November, 1890, made a part of the real estate known as blocks "D" and "E" in the town of Quartermaster, Washington; that the defendant has a lien on said real estate, and the said boiler attached thereto, by virtue of a certain judgment in his favor rendered in the superior court of King county on the 2d day of February, 1894. The second affirmative defense alleges that the defendant acquired a lien upon said premises for certain materials furnished to one James Bleeker for the purpose of making certain improvements upon said premises, amounting to the sum of \$2,346.34; that said Bleeker contracted to pay for the same, but, failing to keep said contract, the defendant filed a mechanic's lien against said premises and by an action in the superior court of King county he had foreclosed said lien, and secured judgment against said Bleeker and certain other defendants. Plaintiff demurred to the second affirmative defense on the ground that the same did not constitute a defense or counterclaim to the allegations of the complaint. The demurrer was overruled. In its reply plaintiff denies the allegations of the first affirmative defense, and states that it has no information sufficient to form a belief as to

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the allegations of the second affirmative defense, except that part of said defense which alleges that said boiler was a part of said real estate, which allegation plaintiff denies; and by way of an affirmative defense to the allegations of the answer, plaintiff alleges that about the 2d day of June, 1891, the said James Bleeker made an assignment for the benefit of his creditors in the superior court of the state of Washington, for the county of Pierce; that an assignee was duly elected, and that, among the assets of said Bleeker, listed and inventoried by said assignee, was a certain brick plant situated upon said premises, consisting, among other things, of the said boiler; that under the orders and directions of such court the assignee took possession of said boiler and finally sold the same, together with other property, to one John Burke, the sale being duly confirmed by said court, and the said Burke paying into court the amount ordered by the court; that thereupon said Burke took possession of said boiler (with other property), and removed the same to a point in the city of Tacoma; that the defendant herein, as one of the claimants against said Bleeker, appeared in the said assignment proceeding by his attorneys, and was regularly served with notice, from time to time, of the proceedings therein, and stipulated that the sale might be made; that thereafter, to-wit, on the 5th day of May, 1894, the plaintiff herein obtained a judgment against the said Burke in the superior court for Whitman county, for the sum of \$5,150.53, and that execution was issued thereunder directed to the sheriff of Pierce county; that said sheriff levied upon said boiler (with the other property), and sold the same to the plaintiff for the sum of \$1,000, which was duly credited upon said judgment; that the plaintiff thereupon took possession of said boiler, and the same remained in its possession until about the 1st day of March, 1897, when the defendant,

without the knowledge or consent of the plaintiff, removed said boiler to a point near said premises and took the same into his possession and has since unlawfully withheld the same.

On the issues thus defined the cause was submitted to the court for trial without a jury, a jury being waived, and, after hearing the evidence, the court found for the defendant and rendered a judgment in his favor dismissing the action at plaintiff's costs. From this judgment plaintiff now appeals. An abbreviated statement of the court's findings is as follows: That on the 5th day of November, 1890, James Bleeker and Mary, his wife, were owners, as their community property, of an equitable estate in the lands described in the answer, and that afterwards, on the 30th day of April, 1891, they became the owners of the legal title by conveyance; that on and after the 5th day of November, 1890, the said James and Mary Bleeker were the owners, as their community property, of the boiler in controversy in this action; that on or about the 1st day of December, 1890, the said James Bleeker annexed and attached the said boiler to said land, and that thereafter the said boiler became and was a part and parcel of the said real estate; that under a contract between the defendant and said James Bleeker, the defendant furnished lumber and material for the said James and Mary Bleeker to be used in the construction of a wharf and other buildings and improvements upon said lands, said material having been furnished between the 1st day of December, 1890, and the 30th day of March, 1891; that within the time allowed by law the defendant filed his notice and claim of lien upon the said lands for said lumber and materials, and thereafter foreclosed said lien against the premises, and recovered judgment against said James Bleeker, which judgment and lien are still un-

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satisfied; that in July, 1892, the said James Bleeker made a general assignment of all his property for the benefit of his creditors to one James H. Price; that in the year 1893, said Price, as such assignee, sold and conveyed to one John Burke all his right, title, and interest as such assignee in and to said lands; that after the said sale the said boiler was, without the consent of the defendant herein, removed from said real estate and taken to Tacoma, Washington; that it afterwards passed into the possession of the plaintiff herein, which had acquired all the rights of said Burke; and that, while in the possession of the plaintiff at the city of Tacoma, it was taken by defendant into his possession, and removed and replaced upon the same real estate where it now remains. From the above facts as found, the court entered the following conclusions of law:

"1. That from and after the first day of December, 1890, the boiler in controversy in this action became so annexed to the real estate described in the foregoing findings of fact that it became a fixture and a part of the real estate, and as a part of the real estate was and became subject to the defendant's lien for material furnished, and subject also to the lien of the said judgment rendered in defendant's favor in the action described in the foregoing findings of fact.

"2. That the said James H. Price, as assignee of James Bleeker, took the lands described in the foregoing findings subject to the said lien of the defendant, and that such assignee's title was subject to the lien of the said judgment mentioned, and that as against the defendant in this action the removal of the said boiler from the lands to which it was attached was wrongful and did not divest any right of the defendant herein.

"3. That the plaintiff in this action acquired no greater right in the said boiler than that possessed by the said Burke.

"4. That the defendant herein is entitled to have the said boiler subjected to the lien of his said judgment, and

to have a judgment in this action to that effect with his costs to be taxed.

"5. That the plaintiff in this action is not entitled to recover the said boiler from the defendant, nor the value thereof, nor damages for its detention, removal or return."

An examination of the record convinces us that there was evidence upon which to base the findings of the trial court. This is an action at law, and tried by the court because a jury was waived. We are, therefore, guided by the same rules which would have obtained had a verdict been rendered by a jury herein. We do not believe the record presents such a state of facts as would have warranted this court in interfering with the verdict of a jury, had such a verdict been rendered. For the same reason we decline to interfere with the verdict of the court. Upon the facts as found, we think there was no error in the conclusions of law. The Judgment of the lower court is, therefore, affirmed.

[No. 3852. Decided April 1, 1901.]

THE STATE OF WASHINGTON *on the Relation of W. J. Meredith v. BOYD J. TALLMAN, Judge of the Superior Court of King County.*

WRIT OF REVIEW — WHEN LIES — INADEQUATE REMEDY BY APPEAL.

Where a remedy by appeal would be of no avail to one ousted from office by a judgment of the superior court, by reason of the fact that his right to the office would terminate before a hearing could be had on appeal, the supreme court has jurisdiction by writ of review to examine and correct the action of the lower court.

COUNTY OFFICERS — TERM OF OFFICE — EXTENSION OF TERM.

Where a county superintendent of schools was elected to office under a statute which provided that his "term of office shall begin on the second Monday in January next succeeding his election and continue for two years and until his successor is

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elected and qualified" and during his term the law was so changed as to make the term "begin on the first Monday in August next succeeding his election," such county superintendent is entitled to hold the office until the qualification of his successor for the term beginning in August, although thereby his term is made greater than two years, since under the provisions of the statute whereby he holds office he was to continue therein for more than two years, in case his successor was not elected and qualified, and consequently the statute deferring the beginning of his successor's term from January to August would not be in violation of art. 11, § 8, of the constitution, which prohibits the extension of the term of any county officer beyond the period for which he was elected.

SAME.

The fact that the incumbent has held office for two terms, and that the constitution (art. 11, § 7) declares that "no county officer shall be eligible to hold his office more than two terms in succession," is immaterial, since his term does not end until his successor is elected and qualified.

SAME — FAILURE TO GIVE NEW BOND — EFFECT.

The fact that an incumbent of a county office failed to give a new bond after the expiration of the two years would not disqualify him for the office, since Bal. Code, § 1518, makes the old bond sufficient, during the time such officer shall continue to hold such office.

Original Application for Writ of Review.

Byers & Byers, for relator.

Root, Palmer & Brown, for respondent.

The opinion of the court was delivered by

MOUNT, J.—The legislature of 1899 passed an act amending § 30 of the code of public instruction so that the beginning of the term of the office of county superintendent of public instruction should be on the first Monday of August next after his election, instead of the second Monday of January, as heretofore. The relator was elected to said office in King county in November, 1896, and re-elected in November, 1898. In November,

1900, his successor was elected, to take office the first Monday in August. On the second Monday of January, 1901, the county commissioners of King county declared the said office vacant, and appointed W. G. Hartranft thereto. Said Hartranft, having duly qualified and having filed his bond, demanded possession of said office, which demand was by relator refused. Thereupon said Hartranft filed his petition in the superior court of King county, setting up the foregoing facts, and praying that said Meredith be ousted from said office and that he be settled therein. Said cause came on for hearing before said court upon a demurrer to said petition, which demurrer was by the court overruled, and judgment entered on January 30, 1901, ousting relator and placing said Hartranft in possession of said office; the court concluding, under the law and the facts above stated, that a vacancy existed in the office of said superintendent of King county on the said 14th day of January, 1901. A petition for a writ of review is now filed in this court, alleging substantially the facts above stated, and that petitioner's remedy by appeal is wholly inadequate, for the reason that before the appeal could be perfected, heard, and determined, relator's right to hold said office would have terminated.

Motion is filed by respondents to dismiss for want of jurisdiction. This motion and the merits of the case are argued together. It was held by this court in *State ex rel. Cann v. Moore*, 23 Wash. 276 (62 Pac. 769), that where an appeal would not be available this court would assume jurisdiction. The motion to dismiss will therefore be denied.

When relator was elected, in 1898, the law then in force was as follows:

"A county superintendent of common schools shall be elected in each county of the state at each general election,

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whose term of office shall begin on the second Monday in January next succeeding his election and continue for two years and until his successor is elected and qualified." Bal. Code, § 2301.

This section was amended during the term of office of relator so as to read as follows:

"A county superintendent of common schools shall be elected in each county of the state at each general election, whose term of office shall begin on the first Monday in August next succeeding his election and continue for two years and until his successor is elected and qualified." Laws 1899, p. 311.

Section 5 of article 11 of the state constitution provides that the legislature shall provide for the election of county officers, "and shall prescribe their duties and fix their terms of office." By § 8 of the same article it is provided:

"The salary of any county . . . officer shall not be increased or diminished after his election, or during his term of office; nor shall the term of any such officer be extended beyond the period for which he is elected or appointed."

The respondent insists that the amendment above named extends the term of office of the relator from January until August, and for that reason is void, and also that the term was fixed by § 2301, Bal. Code, as amended *supra*, at two years, ending on the second Monday in January, 1901, and that the interim between the second Monday in January and the first Monday in August, 1901, was not provided for, and a vacancy therefore existed, which the county commissioners had authority to fill by appointment. It is clear, under the section of the constitution above referred to, that the legislature has authority to fix the term of such office. It is also clear that when the legislature has once fixed the term of an office a subsequent act of the legislature cannot extend such term so that one in office may hold

such office for a longer term than he was elected. This court, in *State ex rel. Hays v. Twichell*, 9 Wash. 530 (38 Pac. 134), uses this language:

“‘Term,’ as applied to time, signifies a fixed period, a determined or prescribed duration. 25 Am. & Eng. Enc. Law, p. 949. A term of office is a fixed period prescribed for holding office. *People v. Brundage*, 78 N. Y. 403. The word ‘term,’ when used with reference to the tenure of office, ordinarily refers to a fixed and definite time. *Mechem, Public Officers*, § 385. In fact, the expression ‘term of office’ so clearly defines itself, the words used are so well understood, and their meaning so generally accepted, that it is useless to attempt to further define it.”

When, therefore, the legislature used the words, “whose term of office shall begin on the second Monday in January next succeeding his election and continue for two years and until his successor is elected and qualified,” it was not meant thereby that his term of office should be two years and no more. The phrase, “and until his successor is elected and qualified” means something. It was not used idly. If so, the term was not fixed at two years and no more, but was two years and more; the further time depending upon the contingency not only of an election, but also of the qualification of the person elected, which might be one day, one month, or any number of months. A person elected to an office, with the term so fixed at two years and such further time, would be entitled to hold the full two years and such further time, viz., until his successor had been elected and also had qualified. In this instance the successor had been elected, but could not lawfully qualify until August. The legislature had power to fix the time when a successor should qualify, by reason of the power to fix the term, and, not having theretofore fixed the end of the term at any “definite time” or “fixed period,” could not be held to have extended the term beyond

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the period for which relator was elected. The authorities are full and clear upon these questions. Throop, Public Officers, § 431, says:

“In such cases there is, in fact, no vacancy, because the officers of the preceding year hold the offices, until others are chosen or appointed in their places, and have qualified. An office cannot be said to be vacant, while any person is authorized to act in it, and does so act.”

To the same effect, see *Mechem*, Public Officers, §§ 126, 128, 130. The case of *Commonwealth ex rel. Broom v. Hanley*, 9 Pa. St. 513, is a leading case. In that case one Brooks had been elected to the office of clerk of the orphans' court, but died before qualifying. The incumbent at the time, and who would have been succeeded by said Brooks, claimed the right to hold office until another general election, because there was no vacancy in the office by the death of Brooks, who had failed to qualify; and the court held, under a constitutional provision that “they shall hold their offices for three years . . . and until their successors shall be duly qualified,” that there was no vacancy in the office. To the same effect are the following: *Gosman v. State*, 106 Ind. 203 (6 N. E. 349); *State ex rel. Carson v. Harrison*, 113 Ind. 434 (16 N. E. 384, 3 Am. St. Rep. 663); *State v. McCracken*, 51 Ohio St. 123 (36 N. E. 941); *State v. Howe*, 25 Ohio St. 588 (18 Am. Rep. 321); *State ex rel. Tredway v. Lusk*, 18 Mo. 334; *People ex rel. Andrews v. Lord*, 9 Mich. 226; *People ex rel. Baird v. Tilton*, 37 Cal. 614; *People ex rel. Parsons v. Edwards*, 93 Cal. 153 (28 Pac. 831); *People ex rel. Murphy v. Hardy*, 8 Utah, 68 (29 Pac. 1118); *Eddy v. Kincaid*, 28 Ore. 537 (41 Pac. 156); *State ex rel. Wagner v. Compson*, 34 Ore. 25 (54 Pac. 349); *State ex rel. Attorney General v. Ranson*, 73 Mo. 78; *Badger v. United States ex rel. Bolles*, 93 U. S. 599. The case of *King County v. Ferry*, 5 Wash. 536 (32 Pac.

538, 19 L. R. A. 500, 34 Am. St. Rep. 880), relied upon by respondent, has no application here. The question in that case was whether sureties upon an official bond could be held liable after the expiration of the term of office of the principal, when the term had actually been extended. The case was decided by the court upon the conceded fact that the term had been extended by legislative act, and the court did not decide that question at all. Under the law as it then existed, there was no constitutional inhibition against extension, and the language employed in the decision was directed only to the question of liability of sureties upon the bond in question.

Respondent urges that relator, having held two full terms, was disqualified to hold over. What we have said applies equally to this question, because the term does not end until the successor is elected and qualifies. The fact that relator had not given a new bond after the expiration of his second two years makes no difference, because the statute (Bal. Code, § 1518) makes the old bond sufficient.

It follows, therefore, that there was no vacancy in the said office. The lower court should have sustained the demurrer and dismissed the petition. The cause is reversed, with direction to the lower court so to do.

REAVIS, C. J., and DUNBAR, ANDERS, and FULLERTON, JJ., concur.

[No. 3798. Decided April 3, 1901.]

CONGREGATIONAL CHURCH BUILDING SOCIETY, *Appellant*,
v. SCANDINAVIAN FREE CHURCH OF TACOMA *et al.*,
Respondents.

24 433
32 577

MORTGAGES — RECORD INDEX — CONSTRUCTIVE NOTICE.

A mortgagee of the "Scandinavian Free Church" is not chargeable with notice of a prior mortgage made by the same corporation, when it was executed under the name of "Scandinavian Congregational Church," and indexed under that name in the mortgage records of the county.

SAME — EXISTING EQUITIES — NOTICE OF ASSIGNEE.

A *bona fide* assignee of a mortgage for value, although assigned to him after its maturity, is not chargeable with the knowledge of his assignor as to the existence of a prior mortgage, since the rule that the assignee of a mortgage takes it subject to existing equities applies to such equities only as exist between the mortgagor and mortgagee and not to those existing between the mortgagee and third persons.

Appeal from Superior Court, Pierce County.—Hon. THOMAS CARROLL, Judge. Affirmed.

Walker & Fitch and *James M. Harris*, for appellant.

Stiles & Nash, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—On the 10th day of July, 1888, the Scandinavian Free Church of Tacoma borrowed of the Congregational Church Building Society a certain amount of money, for which it gave its note, and executed two certain mortgages for security therefor on lots 11 and 12 in block 1213 of the city of Tacoma. This is an action to foreclose one of the mortgages. At the time the mortgage in suit was executed a mistake was made in the name of the mortgagor, in that it was designated as the "Scandinavian

Congregational Church," instead of the "Scandinavian Free Church." The mortgage is signed "Aufin Johnson and Ole M. Espeland, Trustees of the Scandinavian Congregational Church of Tacoma," and Johnson and Espeland acknowledged the execution of the mortgage. In May, 1889, the Scandinavian Free Church of Tacoma borrowed \$900 of the Metropolitan Savings Bank of Tacoma, executed and delivered its promissory note therefor, and, to secure the same, executed and delivered to said bank its mortgage upon lots 11 and 12, in block 1213 of the city of Tacoma; being the same lots that it had mortgaged previously to the Congregational Church Building Society. Thereafter, in January, 1892, the said church society borrowed of said bank \$400 additional, and upon the discharge of the \$900 mortgage, executed and delivered to said bank a new note for \$1,300; also a mortgage of like tenor and amount upon the said lots 11 and 12. In June, 1898, the said bank assigned said mortgage to the respondent, Charles McNamee, who thereupon foreclosed the same, and in August, 1898, purchased at sheriff's sale the property above described. The case was tried by the court without a jury and judgment was entered in favor of the respondents.

There are but two material propositions in this case, the first of which is, was the index of the record sufficient to put the respondents upon their guard? In the index, under the column of "Grantor," is the following:

"Scandinavian
Cong. Ch.
Trustees of
Scandinavian
Congl. Ch.
Trustees of"

It is insisted by the appellant that the names of the grantors are so similar that notice should be imputed to

the subsequent mortgagees; but we do not think this is true. The searcher of the record, who wished to ascertain whether title had passed from the Scandinavian Free Church of Tacoma, would not obtain any light by finding upon the index, "Scandinavian Congregational Church, Trustees of." It cannot therefore be said that the respondents had constructive notice of this mortgage.

It is contended that the agent of the Tacoma Building & Savings Association had actual notice of the existence of this mortgage, and that McNamee, the purchaser of the mortgage, is bound by the notice of his assignor, even though it be conceded that he had no actual notice himself. The testimony is not entirely satisfactory in relation to the knowledge of Post, even conceding that his knowledge was the knowledge of the society. But it is earnestly urged by the appellant that the respondent McNamee, as the assignee of the mortgage, has no better or greater rights than his assignor, the bank, had; that he is the assignee of a mere chose in action, non-negotiable, for the assignment was made after maturity; that his right and title must be measured by the right and title of the person of whom he buys; that he takes it subject to the equities attending the original transaction; and that, if the mortgagee cannot himself enforce it, the assignee has no greater rights. And many cases are cited to sustain this doctrine. We have examined them all and find but very few which sustain the doctrine contended for. The most of the cases simply go to the extent that an assignee of a mortgage securing the non-negotiable or past due negotiable instrument takes it subject to all the equities of the mortgagor of which the mortgagee had notice. But few of the cases make the rule to apply to equities between the mortgagee and third persons. The rule, however, as contended for by the appellant, has been firmly established in the state of New York,

and that is the only state where we have been able to find cases reported which clearly sustain it. The rule was announced in New York as far back as *Bush v. Lathrop*, 22 N. Y. 535, and was reiterated as late as *Owen v. Evans*, 134 N. Y. 514 (31 N. E. 999), where it was flatly held that there was no distinction between the equities existing in favor of the debtor and those in favor of a third person. It is true that in *Sims v. Hammond*, 33 Iowa, 368, it was held that where a mortgagee, with actual notice of a prior mortgage on the premises, assigns the same to a person having no notice thereof, such assignee will be deemed as charged with the notice which his assignor had, and as standing in no better situation. But the supreme court of Iowa, in *Farmers' National Bank of Salem v. Fletcher*, 44 Iowa, 252, a case decided five years later, repudiated the doctrine announced in the former case,—rather, attempted to distinguish it by holding that the court in that case had based its opinion on the constructive notice of the mortgagee. The court in the course of its opinion, referring to this other case, said:

“The decision is based upon *English v. Waples*, 13 Iowa, 57, which turned upon constructive notice to the assignee. This court has never announced the broad doctrine that the *bona fide* assignee of a mortgage for value takes it subject to all the infirmities which attached to it in the hands of the mortgagee,”—

citing several cases in support of the proposition then decided, that the *bona fide* assignee of a mortgage for value does not take it subject to all the infirmities which attached to it in the hands of the mortgagee. Section 843 of Jones on Mortgages (5th ed.) is as follows:

“Whether the rule is limited to equities between the original parties is a question upon which different courts are not in accord. On the one hand, the rule that the assignee of a bond and mortgage, which are merely choses

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in action, takes them subject to existing equities, is limited in its application to such equities only as existed between the mortgagor and mortgagee, and is not extended to those existing between the mortgagee and third persons;" citing many cases. "The reason for this limitation seems a strong one. 'The assignee,' says Chancellor Kent, 'can always go to the debtor, and ascertain what claims he may have against the bond, or other chose in action, which he is about purchasing from the obligee; but he may not be able, with the utmost diligence, to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries; and for this reason the claim of the assignee, without notice of a chose in action, was preferred, in the late case of *Redfearn v. Ferrier*, to that of a third party setting up a secret equity against the assignor. Lord Eldon observed in that case that, if it were not to be so, no assignments could ever be taken with safety.'"

Then it is announced by the author that the settled rule in New York is to the contrary, and the case of *Bush v. Lathrop* is cited.

The following is from 15 Am. & Eng. Enc. Law, p. 860:

"So far as the latter are concerned it has been pointed out that an assignee can readily enquire from the mortgagee what claims he may have against the bond and mortgage which the assignee is about to purchase, but that he may not be able by the utmost diligence to obtain knowledge of the latent equity of some third person. For this reason, in certain states, the rule is well settled that the assignee is only bound by the equities existing between the mortgagee and the mortgagor. This is the law of New Jersey, Pennsylvania and Michigan."

And it is announced that a leading case in New York has established a contrary rule in that state.

It would be profitless to review all the authorities cited. We are satisfied that the great weight of authority is opposed to the doctrine contended for by the appellant, and, unless we are compelled by the weight of authority to ex-

tend the liability of the mortgagee beyond a responsibility for the equities existing between the mortgagor and the mortgagee, we are not inclined to do so.

We think the judgment of the court was right, and it will, therefore, be affirmed.

REAVIS, C. J., and FULLERTON, ANDERS and MOUNT, JJ., concur.

[No. 3635. Decided April 4, 1901.]

THE STATE OF WASHINGTON *on the Relation of B. Roswell Hubbard v. SUPERIOR COURT OF KING COUNTY, and WILLIAM HICKMAN MOORE, Judge thereof.*

MANDAMUS — WHEN LIES — REMEDY BY APPEAL.

The refusal of the superior court of one county to assume jurisdiction of a cause sent to it on a change of venue amounts to a final order of dismissal of the cause, which, being reviewable on appeal, precludes the supreme court from affording a remedy by writ of mandate to compel the lower court to entertain jurisdiction.

Original Application for Mandamus.

Greene & Griffiths, for relator.

L. C. Gilman, for respondents.

PER CURIAM.—Original application for mandamus. Relator filed his affidavit alleging that he is by profession a physician and surgeon; that in July, 1899, he made written application for a license to practice medicine and surgery to the state medical examining board, created under the act of March 28, 1890, then in session at Spokane, and submitted to an examination by the board in the branches designated in the statute, paid the required fee for such examination, and thereupon the board refused

April, 1901.]

Opinion Per Curiam.

such license, and relator, on the 3d of August, 1899, duly took his appeal from said board as provided in the statute to the superior court of Spokane county, that being the county in which was held the last general meeting of the board prior to the refusal of the license; that thereafter, on motion of the relator, a change of venue was granted to the superior court of King county by the Spokane superior court; that thereafter the cause was duly set down to be tried by the superior court of King county, and thereafter, on motion of counsel for the board, the superior court of King county refused to entertain jurisdiction of said cause for any purpose, and ordered it to be stricken from the trial docket on the ground that no change of venue could be granted in such cause. To such ruling of said court relator duly excepted, and his exceptions were allowed.

It will be perceived that the essential complaint of relator is that the superior court of King county refused to entertain jurisdiction of the cause sent to it from the superior court of Spokane county. The affidavit states the reasons of the court for its ruling. We think the ruling of the court must be treated as a final order of dismissal of the cause. The complaint of the relator here, then, is for error in making the order. In this view of the case mandamus will not lie. There is an adequate remedy by appeal. The application for a mandate to compel the superior court to entertain jurisdiction of the cause apparently falls clearly within the rule announced in *State ex rel. Light Co. v. Superior Court*, 20 Wash. 502 (55 Pac. 933), which was a very careful review of the function of the writ issued from this court, and, upon the authority of that case, the writ is denied.

24	440
26	212
24	440
26	447

[No. 3825. Decided April 4, 1901.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK
ROYSE, *Appellant*.

CRIMINAL LAW — EXAMINATION OF JURORS — IMPRESSION OF GUILT.

Where a juror states on his *voir dire* that he has no opinion as to the guilt or innocence of accused, but that he has some slight impression on the subject from having heard the case discussed by persons who did not claim to know the facts, and that such impression would readily yield to testimony, he is not disqualified on the ground of actual bias.

SAME — DIFFERENCE BETWEEN OPINION AND IMPRESSION.

When an attorney in examining a juror as to his qualifications states that there is no difference between having an opinion and an impression as to defendant's guilt or innocence, it is a misstatement of the law, and it is not error for the court to interfere with the examination for the purpose of correcting the statement and instructing the juror to the contrary.

SAME — PREJUDICE — DRUNKENNESS.

In examining a juror as to whether or not he was prejudiced against the defenses of drunkenness and insanity, a question to the juror as to which side he would find on, if the evidence as to drunkenness should be equally balanced, was properly excluded, on the ground that it presented a question of law, upon which it was the court's duty to instruct the jury.

SAME — HARMLESS ERROR.

The refusal of the court to permit counsel to ask a juror whether he would look upon the defense of intoxication with any degree of disfavor, if error at all, was cured by permitting counsel subsequently to propound the question, "should the defense consist in part of emotional or hereditary insanity, aggravated, inflamed, and rendered acute by the excessive use of intoxicating liquors, would you regard that kind of defense with any disfavor or prejudice?"

SAME — HEREDITARY INSANITY.

Although a juror, when asked if he had any prejudice against the defense of drunkenness or insanity, answered that to a certain extent he had, yet his exclusion on the ground of prejudice was properly denied, when his examination, taken as a whole, merely shows that he did not approve of drunkenness, and, in

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answer to questions by the court, he said that he could give that defense due effect and pass upon it the same as he would any other defense, and that it would not require any different evidence to prove it than would any other defense.

SAME.

Where one of the defenses in a criminal case was hereditary insanity, a juror was not disqualified by reason of stating he did not believe in hereditary insanity, when his examination as a whole showed that he did not mean to take that position, but that the defense would have to be proven before he would believe it.

Appeal from Superior Court, Walla Walla County.—
Hon. THOMAS H. BRENTS, Judge. Affirmed.

W. T. Dovell, for appellant.

Oscar Cain, Prosecuting Attorney, for the State.

The opinion of the court was delivered by

DUNBAR, J.—The defendant was tried on information for murder in the first degree, and was found guilty of murder in the second degree. Many errors are alleged which we will not be able to follow in their order, but will undertake to answer in groups as they are presented by the appellant.

Error in refusing to sustain challenges to several jurors, which we will discuss more or less together: The first challenge which the court refused to sustain, and which is alleged as error, relates to juror Cochran. In order that the attitude of the juror may be shown exactly, we will set forth his testimony in detail, as follows:

“Question. Do you know anything about the facts in this case, Mr. Cochran?

Answer. No, sir.

Q. Were you living in this county on the 8th of February, 1900?

A. Yes, sir.

Q. Do you know the defendant, Frank Royse?

A. No, sir.

Q. I will ask you if at the time the crime is charged to have been committed you heard or read anything concerning it?

A. I was at the ranch.

Q. I will ask you if you heard, at the time, of it?

A. I heard different ones passing opinions, passing around.

Q. Were those persons you heard passing opinions and discussing it generally, persons claiming to know the facts in the case?

A. No, sir.

Q. Have you since the time the crime is charged to have been committed, heard it discussed by any one claiming to know the facts?

A. No, sir.

Q. I will ask you if, in case you were permitted to sit upon this jury, you could entirely lay aside what you have heard concerning this case and try it wholly upon the evidence and the instructions of the court?

A. Yes, sir.

Q. I will ask you if you have any opinion as to the guilt or innocence of the defendant?

A. No, I do not think I have, neither one way or the other.

Q. You feel confident that you have no opinion?

A. Not any further than just what I have heard; I don't know whether you would call it an opinion or not.

Q. I will ask you if your opinions are such as would preclude you from finding a man guilty of an offense where the penalty is death?

A. No, sir.

CROSS-EXAMINATION.

Q. Did you ever hear any one who expressed an opinion on the case one way or the other?

A. Just around town.

Q. You heard people around town express an opinion?

A. Some one way and some another.

Q. What newspaper accounts did you read?

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A. I seen a piece in—I think in the *Telegram*, about something near three weeks afterwards.

Q. Did you read the local papers' accounts of it?

A. I do not read the local papers.

Q. Have you read anything recently with reference to it?

A. No, sir.

Q. Now, from all you have heard and read, from all you know of Benjamin F. Royse in his lifetime and from all the information you have on the subject up to the present date, have you any opinion, however slight, as to the merits of this case, as to the guilt or innocence of this defendant of the crime with which he is charged?

A. No, I cannot say that I have an opinion one way or the other.

Q. Have you any doubt in your mind whether you are entirely free from an opinion or not, or an impression, either one—one is the same as the other in my way of thinking?

The Court: The court will say to the juror that there is a difference between an impression and an opinion as a matter of law. If counsel instructs the juror to the contrary I will overrule it.

Mr. Griffiths: I will except to the court differing with me in that way.

Q. Now, say whether you have an opinion or not.

A. Well, I can have an impression slightly.

Q. Is that impression such as would require some evidence to remove?

A. No, sir.

Q. It would not take any to remove it?

A. Very little.

Q. What kind of evidence would remove that impression?

A. Any eye-witness would remove it.

Q. The testimony of any eye-witness?

A. Yes, sir.

Q. That is, the sworn testimony of any eye-witness?

A. Yes, sir.

Q. It would take the testimony of a sworn eye-witness to remove it?

A. Yes, I should want an eye-witness to remove it.

Q. You would want the testimony of an eye-witness to remove it?

A. Yes, sir.

Q. Otherwise you would keep it? You would keep it; it would require the testimony of an eye-witness to remove it?

A. Yes, sir; as far as I know.

Q. Should you be taken and sworn as a juror, and should the defense of the defendant consist in part of drunkenness to such an extent as to render him in law incapable of committing the crime of murder, have you any feeling, prejudice, or bias of any kind that would prevent you from giving to that defense the same fair, just, and honest verdict you would give any other defense?

A. I should give him the same.

Q. I will ask you the same question with reference to emotional and hereditary insanity.

A. It would have its weight.

Q. That is not a satisfactory answer. That is to say, if you believed he was crazy at the time you would not convict him, is that it?

A. That is my impression; yes, sir.

Q. Now, following up that notion you have, suppose that defense consisted in part of emotional and hereditary insanity, aggravated and rendered acute, as the doctors say, by drunkenness; would you give as fair treatment to that as any other defense in the world?

A. Yes, sir.

Q. You have no doubt of your ability to do so?

A. No; not at all.

Q. And if you were taken and accepted and sworn as a juror here you could and would, so far as the defense of emotional or hereditary insanity or drunkenness is concerned, try this defendant as fairly and impartially as any other case in the world?

A. Yes, sir.

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(Here the juror is challenged by the defense for actual bias.)

The Court: Would the statement of any eye-witness remove the impression you have?

A. Yes, sir.

The Court: Would you require it to be sworn to?

A. No, sir; because I have nothing but hearsay.

Mr. Griffiths: I would like to ask one question suggested by the court's question.

Q. (Griffitts) That is to say, the statement of an eye-witness, although not sworn, whom you believed, would remove it?

A. Yes, sir.

Q. It would have to be such an eye-witness as you believed?

A. Why, I would want somebody that knew something and whom I believed on the other side.

Q. Somebody whom you could believe and knew?

A. Yes, sir."

The challenge was renewed, and overruled by the court. It is evident from the examination that this witness did not have such an opinion of the guilt or innocence of the accused as ought to preclude him from sitting on the jury. It is true this court has frequently decided that where a juror has testified that he had an opinion, and afterwards upon an examination by the court or the prosecuting attorney, stated that he could disregard that opinion and try the case upon the facts presented and the law as given him by the court, such a juror ought not to be imposed upon the defendant, for the reason that a man is not able to determine whether he can lay aside or disregard opinions which he possesses, and that it is the constitutional right of a defendant to be tried by a juror who is absolutely impartial; and this doctrine we adhere to. But it must appear that the juror has an opinion upon the question of the guilt or innocence of the defendant, and not a

mere impression from remarks which he has heard without having determined whether such remarks are true or untrue. In discussing this question of impression, it was said by this court in *State v. Krug*, 12 Wash. 288 (41 Pac. 126):

“The word ‘impression,’ if it can properly be applied to a mental operation, does not reach the strength of an opinion. An opinion is a conviction which is based, and must be based, upon testimony. An impression is a mere fancy, or lodgment in the mind which is not based upon testimony, and the existence of which cannot be traced to proof.”

Applying this distinction to the juror whom we are now considering, he nowhere testifies that he had heard the pros and cons of the case or that he had weighed the testimony or come to any conclusion from anything that purported to be testimony in relation to the guilt or innocence of the defendant. He stated at the outset that he had not heard the case discussed by any one who claimed to know the facts concerning it, and that he did not have any opinion one way or the other. It is the voluntary information given by a juror which tests his suitability, rather than answers that are elicited by adroit and confusing questions. Witnesses are frequently made to say things exactly opposite from what they mean, and, having once made a mistake, their subsequent answers simply exhibit more confusion and excitement. The object of cross examination is to elicit the truth and not to elicit that which is not the truth. From the whole testimony it plainly appears that the juror was qualified.

The appellant also complains of the statement of the court in correcting the attorney in his statement to the juror, as set forth above, in relation to the difference between an impression and an opinion. In the first place, the question asked was not a proper one for the attorney for

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the defense to ask a juror, or, rather, the attorney should not have stated to the juror in his question what his view was of the difference or lack of difference between impressions and opinions. In the second place, it was not a correct statement of the law as announced by this court in *State v. Krug, supra*, and the court was justified in correcting the attorney in that respect.

The same thing may be said in relation to the examination of jurors, Paul, Zaring, and Campbell. Excerpts from the testimony of each might lead to the conclusion that these jurors had opinions which should preclude them from sitting on the jury, but their examinations by both the state and the defense, when viewed as a whole,—and they must be so viewed to arrive at a proper determination,—show that in neither instance was there an opinion entertained which would prejudice the rights of the defendant. It is not hard to discern that when the jurors talked about opinions, they were talking about mere rumors which they had heard in relation to the crime. None of them had heard anything said in relation to the crime by any one who professed to relate the facts from any knowledge thereof. It was simply newspaper notice and neighborhood talk. It did not appear in any instance that any one who knew anything about the facts, or who professed to know anything about them, had attempted to relate the facts to the jurors. There was no indication that these men were prejudiced, for or against the defendant, to the slightest extent, and, unless it appears from the whole examination that a juror actually entertains an opinion in relation to the guilt or innocence of the defendant, he cannot be excluded for actual bias.

Assignments 9, 10, 11 and 12 relate to the refusal of the court to permit defendant's counsel to examine jurors Murphy, Bowers, and Williams upon their *voir dire* as

to whether or not they were prejudiced against the defenses of drunkenness and insanity. During the examination of juror Murphy he was asked this question:

"Now, if the evidence as to his drunkenness should be equally balanced, which side would you find on?"

The Court: That is a question of law. I will instruct him later in regard to that point. I will ask him whether he would follow the instructions of the court upon that point as to the quantity of evidence that would be necessary to convict.

Juror: Yes, sir.

Mr. Griffiths: Does the court disallow my question?

The Court: I substitute mine."

To which an exception was taken. We do not think that this was a proper question to ask the juror. As the court remarked, the amount of testimony which it will take to convict is a question of law to be given the jury by the court, and there is ample opportunity to test the prejudice of jurors on questions of this kind without submitting legal propositions to them. During the course of the examination of the juror Bowers the following occurred:

"Q. If the defense in this case should consist in part of drunkenness, that is, an allegation that the defendant at the time of the alleged commission of the offense, if any was committed, by the defendant, he was so drunk from the excessive use of intoxicating liquors as to not know what he was about and was in law irresponsible for his acts, would you look upon such a defense with any degree of disfavor?"

A. I would abide by the law.

Q. Would you regard such a defense as that with any degree of disfavor?"

A. I don't favor drunkenness.

Q. Still you have not answered the question, would you regard the defense with any degree of disfavor?"

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The Court: Would you consider that defense, if the court told you it was a defense; would you give it the same consideration as any other defense? If the court told you this was a good defense, would you give it the same consideration as any other defense?

A. Yes, sir.

Mr. Griffiths: If it please the court, I insist upon an answer to my question—whether or not he would regard such a defense with any degree of disfavor?

The Court: I think he has answered what the law contemplates by the question.

Mr. Griffiths: Then the court disallows the question.

The Court: Yes, I disallow that question, in that form."

We think again that the question, "Would you regard such a defense as that with any degree of disfavor?" was indefinite and misleading, and when the witness answered the question by saying he would abide by the law it was a sufficient answer to the question, faulty as it was. In no event, however, was the defendant prejudiced by the acts of the court, conceding that it was a proper question; for, after the colloquy above described, counsel for the defense propounded the following question: "Should the defense consist in part of emotional or hereditary insanity, have you any bias or prejudice for or against that kind of a defense?" to which the witness responded, "No, sir." Then follows the question: "Should the defense consist in part of emotional or hereditary insanity, aggravated, inflamed, and rendered acute by the excessive use of intoxicating liquors, would you regard that kind of a defense with any disfavor or prejudice?" to which the juror answered, "No, sir."

It is insisted that the juror Williams ought to have been excluded from the panel by reason of his prejudice against the defenses of insanity and drunkenness. When asked if he had any prejudice against the defenses of drunkenness or insanity, the juror answered that to a certain ex-

tent he had. This question is always misunderstood by witnesses or jurors. No man intends to say that he has a prejudice for or against anything which will influence his verdict or action; for, when he says that he will be influenced by his prejudices, he confesses himself unworthy to decide any question, and the juror in this case evidently simply meant, as shown by his whole testimony, that he did not approve of drunkenness, and he said, under certain questions that were asked him by the attorney for the defense, that he would not treat the defense of drunkenness with the same confidence and respect that he would other defenses. But he evidently did not mean what he said; for, when he understood the question as propounded by the court, he said that he would give that defense due effect, and would pass upon such a defense as that the same as he would any other defense, and that it would require no other evidence to prove it than would any other defense. The juror's testimony as a whole shows that he was not disqualified by reason of any prejudice in relation to drunkenness or insanity.

It is insisted that the juror Zaring had such an opinion as should have disqualified him from acting as a juror; but we are not able to see anything in his testimony that distinguishes him from the other jurors. While it is true that he stated that he had an opinion, the whole testimony shows that it was not a fixed opinion, but a mere impression that obtained in his mind from newspaper accounts; for, in answer to the question, "When did you form that opinion?" he said, "When I saw the piece in the paper." No man of common sense forms a fixed opinion in relation to matters of this kind from what he sees in newspapers. The testimony of all of these jurors shows, while not always expressed in so many words, that what they meant to say was that, if the matters and things

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which they had read and heard were true, they had an opinion. This was drawn out in most of the cases, the jurors stating that, on the assumption of the truth of what they had heard, their opinions were formed. It is alleged that the juror Erwin was not at the time a qualified elector of the county, but we think the testimony shows plainly that he was.

Assignment No. 19 alleges error of the court in not sustaining the challenge to juror Bowen for the alleged reason that he did not believe that there was such a thing as hereditary insanity. To show the character of the examination that was conducted in this case, we will set out the examination of the juror on that question in full:

“Q. If a part of the defense in this case should consist of an allegation that at the time of the commission of the offense, if any was committed, the defendant was so drunk as to not know what he was about and irresponsible in the eyes of the law for what he did, would you look upon a defense of that kind with any degree of disfavor or suspicion?

A. I don't quite understand you.

Q. Have you any prejudice against the defense of drunkenness in a crime of this kind?

A. No, I have not.

Q. Sure?

A. It would depend on how the man was.

Q. You mean how drunk he was?

A. Yes, sir.

Q. Well, if—do you look with disfavor upon the defendant interposing in his own behalf the defense of drunkenness to a charge of this kind?

A. No.

Q. How is it as to insanity, emotional or hereditary?

A. I do not believe in hereditary insanity.

Q. You don't believe in hereditary insanity?

A. No.

Q. That is a fixed objection with you, is it, that you do not believe there is such a thing as hereditary insanity?

A. There may be such a thing.

Q. You doubt it?

A. I doubt it.

Q. You yourself do not believe there is such a thing?

A. No.

Q. Do you think there is any such a thing as emotional insanity?

A. I think there is.

Q. Have you any prejudice against that sort of a thing as a defense?

A. I don't think so.

Q. You don't think you have?

A. No.

Mr. Griffiths: I challenge this juror for cause and actual bias; he is in such a state of mind with reference to the case and the defense that renders him an unfair and partial juror. I think he discloses that he does not believe there is any such thing as hereditary insanity. I do not want to take up the job in this case of coming here and teaching the juror that there is such a thing as hereditary insanity, and that my defendant has got it. I think he has a fixed belief that there is no such thing as hereditary insanity. In other respects the juror seems fair.

The Court: Do I understand you to say you do not believe there is insanity of that kind that can be transmitted from father to son and mother to son? That a person who is insane cannot transmit that disease to his children?

A. It might be, but I have doubts in my mind about it.

Q. Have you read the question up?

A. No, I have never read it.

Q. If physicians, regular physicians or persons who have made that a study, that question a study, should testify to you here, before you, that it may be, that it is transmitted from an ancestor to his progeny, his posterity, would you believe them and take it and accept it as a truth in this case?

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A. I think so.

Q. And go upon it?

A. Yes, sir.

Q. And give it its effect the same as any other fact that may be established?

A. Yes, sir.

The Court: I rather think the juror misunderstood what you meant by hereditary insanity.

Mr. Griffiths: Now, if doctors disagree on the subject, and part of them swear that—

The Court: I don't think the doctors disagree.

Mr. Griffiths: I said if they do. If they don't, it is the only thing they agree on.

The Court: I think they agree; the court can state that as a matter of common knowledge.

Mr. Griffiths: As far as I am concerned, I believe in hereditary insanity, and I have believed in it for a long time.

Q. (Mr. Griffiths) Have you entertained this opinion that there is no such thing as hereditary insanity for a long time?

A. No, only lately, upon hearing about this case.

Q. You have now got a doubt that there is such a thing as hereditary insanity?

A. If I had good proof, I would believe it.

Q. Well, what is the state of your mind now; do you believe there is such a thing or not?

A. In some cases there is such a thing.

Q. In some cases there may be?

A. In some cases there may be, I say.

Q. What I am trying to get at is your belief on the subject, do you believe in hereditary insanity or do you not believe in it?

A. I think I do.

Q. You think you do?

A. Yes, sir.

Q. Didn't you say positively a little while ago that you did not?

A. I said I didn't in all cases.

Q. Did you mean by that that you did not think that everybody on earth had hereditary insanity, but some fellows may have, is that what you mean?

A. No, sir.

Q. There would have to be a special cause for it before you would believe it, would there?

A. I would have to have it proven before I would believe it.

Q. Take pretty strong proof?

A. Yes, good authority.

Q. If that authority should be insufficient and leave you in doubt as you are in now, you would still remain with that opinion against the idea?

A. Not if strong enough.

Q. Can you tell how strong it would have to be to remove that belief?

A. As I said, good authority.

Q. Suppose some doctor you didn't like swore there was such a thing as hereditary insanity, would that be authority enough?

A. Well, if he knew his business.

Mr. Griffiths: I submit, your honor, that a man that does not believe in the existence of hereditary insanity is a good man to challenge. I interpose a challenge."

This is a sample of the conduct of the examination of the jurors all the way through. The jurors frequently did not understand the questions that were propounded to them, and their answers were misconstrued by the counsel for the defense. When this juror answered that the plea of hereditary insanity would have to be proven before he would believe it, he showed the condition of mind that should obtain with any good juror. That is all that can be gathered from the whole examination,—that he would demand that such a plea should be proven. Outside of this, it does not appear from the record that the question of hereditary insanity was a serious question in the case.

The other assignments relate to remarks made by the

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court during the progress of the trial and the action of the court in directing a change of counsel during examination, which it is claimed were prejudicial to the defense. An examination of the whole record fails to convince us that the remarks or actions of the court were prejudicial. A more particular review of the circumstances attending the trial which led up to the alleged errors complained of could not be beneficial to any one.

We do not think that any error was committed by the court in relation to the admission of testimony in any particular. An examination of the whole record convinces us that no prejudicial error was committed, and the judgment will be affirmed.

REAVIS, C. J., and FULLERTON, ANDERS AND MOUNT, JJ., concur.

[No. 3246. Decided April 5, 1901.]

CATHERINE T. MAYNARD, *Appellant*, v. PUGET SOUND NATIONAL BANK OF SEATTLE *et al.*, *Respondents*.

DEEDS — DESCRIPTION — CONSTRUCTION — LANDS BETWEEN HIGH AND LOW WATER OF BAY.

Where a conveyance of land abutting upon an arm of the sea describes the line as running "to Duwamish Bay; thence northerly, following the meandering of said bay," the conveyance must be construed as passing title to the tide land lying between the lines of high and low water, in the absence of anything in the deed indicating an intention to reserve the strip of land lying beyond the high water line.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

O. P. Mason and J. M. Epler, for appellant.

Preston, Carr & Gilman, Thomas B. Hardin and Pierre P. Ferry, for respondents.

PER CURIAM.—This action was instituted in the superior court of King county for the purpose of quieting title in plaintiff to the following described real estate, to-wit: All that part of lots numbered 3 and 4, in block numbered 9, Terry's Fifth Addition to the city of Seattle, lying east of the west meander line of the donation land claim of David S. Maynard, and west of the west line of Eighth street in said city, county of King and state of Washington. The plaintiff, appellant here, alleges in her complaint that said David S. Maynard is now deceased; that he was the owner in fee simple of said real estate at the time of his death; that plaintiff is now the owner in fee simple by virtue of a deed of conveyance from H. C. Maynard and Frances J. Patterson, as heirs of said David S. Maynard, deceased; that the defendants assert ownership of said real estate by virtue of some deed of conveyance which is a cloud upon plaintiff's title; and she prays that such cloud be removed and her title quieted. The defendants, respondents here, by their several answers deny that plaintiff is the owner in fee simple, or has any interest whatsoever in the property described; and they allege affirmatively that they are the owners in fee, respectively, of the undivided interests as set forth in their several answers; that they and their predecessors have been for more than ten years last past the owners of, and in the open, actual, and notorious possession of, said property; and that neither plaintiff nor any other person holding adversely to defendants has been in possession thereof within said time. It appears by the record that on July 11, 1857, said David S. Maynard, together with his wife, Catherine T. Maynard, the appellant, sold and conveyed by deed to Charles C. Terry the lands described as follows:

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"Commencing at a stake 66 feet east of the northeast corner of lot 8, in block 52 (corrected to read 58), numbered and designated on D. S. Maynard's town plat of Seattle; running east to the northeast corner of said Maynard's land claim; thence south 134 rods; thence west to Duwamish Bay; thence northerly, following the meandering of said bay to the south line of said town plat of Seattle; thence east to the southeast corner of said town plat; thence north to the place of beginning; containing 260 acres more or less, together with all and singular the rights, appurtenances and hereditaments thereunto belonging or in anywise appertaining; and also all the estate, right, title and interest of the said first mentioned parties to the premises hereinbefore described and every part and parcel thereof."

Upon the death of said Terry, the lands so conveyed passed by due administration to his heirs at law, of whom the respondents are the successors in interest. The appellant claims title by a subsequent conveyance from the children of the deceased, Maynard, as his heirs at law. It does not appear from the record that there was ever any administration upon the estate of the said Maynard, nor is it shown whether he died testate or intestate. The premises in controversy consist of land situated outside of the line of high water and inside the meander line of the Maynard donation claim. The appellant's contention is that the land in controversy did not pass by Maynard's deed, on the theory that the description in Maynard's deed of the course, "thence west to Duwamish Bay; thence northerly, following the meandering of said bay to the south line of said town plat of Seattle," made high water mark on Duwamish Bay the western boundary, and therefore Maynard remained during his life time the owner of the land, and at his death his heirs became the owners thereof. Appellant's counsel in their brief concede that, if the above description includes this land, then

they have no standing in court. It appears that when Maynard conveyed to Terry, he commenced his description at the western limit on the north portion of the donation claim still owned by him and unplatted. He then ran a course to the northeast corner; thence his course was south 134 rods. It is not contended that this last named course did not extend to the south line of what still belonged to him. We think it is manifest from the whole record that such was the case. He ran thence west to Duwamish Bay. As suggested in respondents' brief, so far he had followed closely the line of his ownership, leaving nothing in himself. He thence followed the meanders of the bay to the south line of his town plat, thence along the south line of his town plat to the southeast corner of his plat, and thence along the east boundary of his plat to the point of beginning. He reserved nothing to himself on the north, east, or south boundaries, and he did not express any intention to retain anything on the west. Did he intend to convey all that he owned? It is now claimed, at a date forty years after the conveyance, that he intended to reserve on the west the land inside of his patent line covered by the ebb and flow of the tide. This land was not fit for cultivation or residence purposes, and, from all that is disclosed by the record, we do not think it would have had any material value for business purposes at that time. These facts would seem to indicate that Maynard did not intend to reserve anything in the way of tide lands or riparian rights between the upland and the bay, inasmuch as no such reservation was expressed. These circumstances are also supplemented by the testimony of the witness Whitworth, a civil engineer and surveyor, who was upon this very tract with Maynard some thirty years ago, ten years after the conveyance to Terry. Whitworth was surveying the Terry

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tract and Maynard was called on to show him certain points with reference to the south line of the Maynard town plat. Maynard had prior to the Terry conveyance conveyed a tract on the south of the Terry tract to one Plummer, and in conversation with Whitworth while upon or near these same premises he called attention to the fact that the Plummer conveyance was different from the Terry conveyance in that the Plummer conveyance only "went to the shore," because it was described as "beginning at a post set upon the shore." Whitworth says that he then "surveyed it as running to deep water with the understanding that this was different from the Plummer tract, which was bounded by the shore line." It must be remembered that the description in the Terry deed is not to the *shore of the bay*, but to the *bay itself*. It is well understood that the term "shore" includes the strip of land lying between the lines of high and low water mark, and if the words of the grant were limited by "the shore," without any qualifying words to indicate whether the inner or outer line of the shore was intended, then the rule of construction might perhaps limit the grant by the inner shore line. But where there are words in the grant indicating a different intention,—that is, an intention to extend across the shore to low water mark,—such words, together with corroborating circumstances, will be construed as extending the grant to the outer shore line or low water mark. The language of this grant, "thence west to Duwamish Bay; thence northerly, following the meandering of said bay," taken with the attending circumstances already mentioned, we think must be construed as extending the grant across the shore, thus including the tide flats and the land in question.

In the case of *Snow v. Mt. Desert Island Real Estate Co.*, 84 Me. 14 (24 Atl. 429, 17 L. R. A. 280, 30 Am. St.

Rep. 331), the plaintiff sought to recover certain flats between high and low water mark of the sea at Bar Harbor, and claimed under a deed containing the following description: "Beginning at the sea." The court held that the words used intended to describe the sea side and not the land side of the shore, and that they included the shore to low water mark. We think the words in the Terry deed "to Duwamish Bay" are equivalent to the words "at the sea."

The judgment of the lower court is affirmed.

[No. 3544. Decided April 5, 1901.]

JOHN L. STANLEY, *Respondent*, v. ELLA MURPHY STANLEY, *Appellant*.

DIVORCE — CRUEL TREATMENT — PLEADING — CONCLUSIONS.

A complaint for divorce on the ground of cruel treatment is demurrable for want of facts when the allegations that defendant is quarrelsome and vicious in disposition and murderous in threats against plaintiff and his mother are mere conclusions, without any specification of what defendant's acts or threats were, or how or when made, and when in none of the allegations setting up cruel treatment is there any specification of such facts as tend to establish injury to the health or person of plaintiff.

SAME — INABILITY TO LIVE TOGETHER.

Under Bal. Code, § 5716, which provides that "a divorce may be granted upon application of either party for any other cause deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together," the mere fact that plaintiff believes he and defendant can no longer live together affords no legal cause for divorce.

SAME — SUFFICIENCY OF EVIDENCE — NON-SUIT.

In an action for divorce on the ground of cruel treatment, plaintiff should be non-suited, where his testimony shows that he was fully acquainted with the character of defendant prior to marriage, that he had failed to provide for her, that they lived together only about five months after marriage, that he

24	460
27	580
24	480
28	614
24	480
38	492

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abandoned her within one week after the birth of their child, and that her threats against his life and that of her child were called forth by his refusal to live with her again.

Appeal from Superior Court, King County.—Hon. ORANGE JACOBS, Judge. Reversed.

W. F. Hays, for appellant.

The opinion of the court was delivered by

REAVIS, C. J.—Appeal from decree of divorce. The complaint is substantially as follows: Paragraph 1 alleges residence of both plaintiff and defendant in King county for more than nine years last past. Paragraph 2 avers that when plaintiff was about twenty-one, and defendant twenty-three, years of age, in the city of Seattle, in March, 1897, the plaintiff's father, on whom he relied for guidance and counsel, was absent from the city; that throughout the year 1896, until about February, 1897, defendant was known to plaintiff as a lewd and reckless girl, who had with young men a promiscuous and unrestrained intercourse, and that on the 28th day of January, 1897, defendant procured and caused to be issued out of the justice's court a warrant for the arrest of plaintiff upon a charge of seduction, and caused the plaintiff to be arrested and imprisoned for one night; that plaintiff was without money at the time and without any person to consult with and confide in except his mother, who was in extreme distress over his imprisonment and urged him to do everything necessary to secure his release from such imprisonment, which his mother regarded as a disgrace to his family; that the plaintiff was the sole reliance of his mother and four minor children for support and maintenance; that plaintiff saw no other means of securing release than to intermarry with defendant, and they were married on the 29th of January, 1897. Paragraph 3 is

that a son, John Stanley, was born to defendant on the 28th of June, 1897. Paragraph 4 states that plaintiff strove to live with defendant in peace and harmony and be a good husband and kind father to the child, but from the day of the marriage, without intermission, until they separated on the 5th of July, 1897, to quote the allegation, "she was quarrelsome, vicious in disposition, murderous in threats against the plaintiff and his parents, hysterical and ungovernable in temper, crazy in her actions, and by her causeless and unprovoked boisterousness, screaming, holloeing and other wild conduct by day and night, an intolerable nuisance to all her neighbors;" that, although plaintiff's mother was uniformly generous and kind to defendant, defendant manifested no appreciation of such kindness, but, on the contrary, threatened to kill plaintiff's mother; that defendant frequently threatened to kill herself and child; that defendant grew up without education, training, discipline, guidance, or restraint of any kind, and is in reality an untutored person, incapable of reformation, and dangerous to herself and all around her; that she is wholly unfit to have the custody of the child, and it is not safe to leave the child with her; that plaintiff is in position to have good care taken of the child and is willing and anxious to do so; that plaintiff's mother takes a warm interest in the child's welfare, has a comfortable home, and is possessed of means to give the child a careful training and a good religious and secular education; that it is to the highest interest of the child that he be taken from the custody of the defendant and given into the custody of the plaintiff, who thereupon will place him in charge of his mother. Paragraph 5 is that after living five months with the defendant "and making every effort in good faith to pacify and civilize her and make her a respectable wife and mother," plaintiff gave up the

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endeavor in despair, as entirely impossible of accomplishment, and has ever since the 5th of July, 1897, lived separate and apart from her; that, during the time plaintiff lived with her, she made his life a burden and subjected him, by her daily violence of speech, her vulgarity and coarseness of manners, and her total disregard of the decencies of life, to constant humiliation and disgrace in the eyes of his family, friends, and neighbors; that he and she can no longer live together. Paragraph 6 alleges there is no community property, and that neither spouse has any separate property or means. Paragraph 7 declares that it is to the best interests of the plaintiff, of the defendant, and of the child that the marriage be dissolved, and that the custody of the child be awarded to plaintiff, who is a fit and proper person. To the complaint the defendant filed a general demurrer, for the reason that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled. The first assignment of error is upon the ruling on the demurrer.

It is difficult to conceive any legal ground for divorce stated in the complaint. There does not appear any sufficient allegation of cruel treatment, which is the only ground intimated. The essence of the statement of the legal ground of cruel treatment is the specification of such facts as tend to establish injury to the health or person of the complainant. 1 Bishop, Marriage, Divorce & Separation, § 1537. It will be observed that the charges made against defendant state that she was quarrelsome and vicious in disposition and murderous in threats against the plaintiff and his parents. There is no specification of what those threats were, or how or when made, so that the court can conclude their effect; but the plaintiff concludes that defendant made herself an intolerable nui-

sance to all her neighbors. That might be humiliating to the plaintiff, but it would not be legal cause for divorce. The averment of threats against plaintiff's mother and want of appreciation of his mother's generous conduct, are of the same general character,—mere conclusions. The strong expression of defendant's defective education, training, and reckless girlhood, in view of the acquaintance of the plaintiff with, and knowledge of, defendant prior to the marriage, becomes immaterial. No rule is better established than that an ungovernable temper or reckless conduct previous to marriage, when all known to the plaintiff, are immaterial in a suit to dissolve marriage. Such dissolution can be made only upon grounds arising subsequently to marriage. That plaintiff believes he and defendant can no longer live together does not allege any ultimate legal cause. In *McDougall v. McDougall*, 5 Wash. 802 (32 Pac. 749), it was observed:

"The only theory upon which we can account for the action of the court below is that it came to the conclusion that, under all the circumstances of the case, the parties would not probably again live together as husband and wife, and from that fact assumed that it would be proper to decree a dissolution of the marriage bonds. . . . As our statute at present stands, it is not enough to authorize a decree of divorce that the court should find as a fact that the parties will no longer live together as husband and wife. It is necessary that there should be found to exist some of the causes mentioned in the statute in favor of the one as against the other party, and that the party in favor of whom such cause of divorce is found has not been guilty of like misconduct against the other party."

Again, the provision of our Code, "A divorce may be granted upon application of either party for any other cause deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together"

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(§ 5716, Bal. Code), received construction in *Colvin v. Colvin*, 15 Wash. 490 (46 Pac. 1029). There the superior court found "that the parties cannot hence live together," and it was insisted that this finding invoked the discretionary power of the court to grant the decree under § 5716, *supra*. It was observed by the court:

"We do not think it was intended by the legislature that a divorce should be granted in every case wherein it should be found 'that the parties can no longer live together,' and where, as here, their failure to live together is due to their own obstinacy and stubbornness, we think a divorce should be denied. It is not the policy of the law that divorces should be granted merely because parties 'from unruly temper' or mutual wranglings live unhappily together. In order to have relief, it is not required that the party complaining should be wholly without fault for the law recognizes the weakness of human nature, and measures the conduct of the parties by the standard of common experience. But where the parties to a divorce suit are *in pari delicto*, the conduct of each being a constant aggravation to further offense by the other, no divorce will be granted at the instance of either party."

And *Cate v. Cate*, 53 Ark. 486 (14 S. W. 675), is quoted with approval as follows:

"Unhappiness sufficient to render the condition of both parties intolerable may arise from the mutual neglect of the conjugal duties; but when the parties are thus at fault, the remedy must be sought by them, not in the courts, but in the reformation of their conduct. The remedy is in their own hands, and until it has been tried without effect by the party complaining, the courts will not give effect to the complaint. Until this home remedy has been tested and failed, the condition of each may be said to be due to his or her own acts, and one must bear the consequences of his own misconduct."

The matter in the second paragraph, preceding the marriage, is immaterial and affords no grounds for its disso-

lution. It seems to be the confession of a full grown man of his own delinquencies, and a plea of his lack of personal virtues in avoidance of such confession. We conclude that, as against the demurrer, the complaint was insufficient.

But upon an examination of the evidence given at the trial we are convinced plaintiff offered no substantial testimony to entitle him to a decree. He should have been nonsuited at the conclusion of his own testimony. He stated that he had known defendant seven years before the marriage, his family and hers living near each other during the whole time, and that he was well acquainted with her; that he was very intimate with her, and that he knew she was wild and reckless, and kept company with various young men, and was running around and sporting with them; that he knew she had borne a child some years before; and that he himself had been intimate with her; and that he married her to avoid a prosecution for seduction. He says that after the marriage he could not get along with her at all. The reason was her temper, quarreling, and threats. As to threats, he says she threatened to kill him and kill herself and kill her child; that these threats were made when she had "spells", two or three times a week, and that she used bad language, swearing and hollooming and screaming. He says she was somewhat hysterical, and it was impossible for plaintiff to stand that; that he tried to avoid quarrels with her, and that he himself was very good natured; that defendant's family were quarrelsome among themselves. The plaintiff, however, in his examination in chief, in answer to questions from his own counsel, gave much that was explanatory of these threats he testified to. The following question and answer give the true color of his testimony:

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"Question: Now, you have mentioned these threats; just give the court fully all that you know about her making threats against herself and the child and anybody else.

"Answer: She would threaten to kill my mother. I don't know how many times she would make these threats, but I know two dates she did make these threats since I came back from Alaska. I went to her to see the baby, and talked to her, and she wanted me to live with her, and I told her I could not do it, and she said she would kill the baby and kill herself and kill me. That was the last day of June. The first day of July I went to see her again, and she said she would kill the baby, and wanted me to come into the house and see the poison she had bought. I told her, no, I wouldn't do it. I told her not to do anything like that. And she wanted to bring the poison out to me, and I wouldn't have it."

He further testified that he lived with her about five months after the marriage. A very few days before her confinement, plaintiff and defendant were ordered or sent from his father's house, and they occupied a wretchedly furnished room in an isolated house not far off, plaintiff still taking his meals and remaining most of the time at his father's, while defendant was alone, and he was absent when she was confined. He testified that the child was born on the 28th of June; that he left her on the 5th of July following; that he left her because at the time she was quarreling and complaining of him and threatening to kill his mother, and that in such a quarrel he left her, and did not return for over two years, when he went to see the child, and told her he would not live with her and wanted to be free from her, and she made the threat to kill herself and kill the child. It appears that plaintiff had practically contributed nothing to the support of the defendant at any time after the marriage. Plaintiff also testified that at the time of the marriage his family and defendant's were of about equal station. They were

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then poor and lived by daily labor. Upon cross-examination, plaintiff again gives the true color surrounding the threats which he averred defendant made. In answer to what were the circumstances he answered: "Why, I and her were talking. I was trying to reason with her and trying to have her give me my freedom. And I told her how I was fixed. I had nothing. I told her I couldn't live with her. It was impossible. And she said she would kill herself and kill the child and kill me." He also testified directly that no suspicion of infidelity had arisen since marriage. It is apparent, without further reviewing the evidence of the plaintiff, that it states no facts which can fairly be construed into such cruel treatment as would occasion reasonable apprehension of personal violence; and surely he shows himself fully in delinquency in cause for irritation on the part of the defendant. He seems to have been absolutely recreant in every duty he owed to defendant as her husband. Under the rule in *Colvin v. Colvin*, *supra*, announced by this court, he is not entitled to any relief. The testimony also showed that plaintiff's father, with whom he was associated, had, since the marriage and plaintiff's desertion of his wife, acquired quite a competence in Alaskan adventure, and the family were quite well-to-do, and plaintiff's station in life much improved. Considerable testimony was heard for defendant and given by several witnesses, contradicting many of the statements of the plaintiff as to the conduct of his wife; and she denied all the material statements relative to herself. It appeared at the trial that the child, John Stanley, was a robust, healthy child. There was considerable testimony as to the suitableness of the defendant to retain his custody. There was some conflict in the opinions of the witnesses and perhaps some partisanship displayed. But it appeared that the defendant has been

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a laundress for some considerable time, getting fair wages; that she is industrious and very fond of the child, and there seems to be no reason for interference with his custody, on the facts shown. Certainly, from the disclosures made by himself as well as admitted, the plaintiff is not a more suitable person to take care of the child than its mother.

The decree is reversed, with instructions to dismiss the cause.

DUNBAR, FULLERTON and ANDERS, JJ., concur.

[No. 3223. Decided April 6, 1901.]

TOWNSEND GAS AND ELECTRIC LIGHT COMPANY, *Respondent*, v. D. H. HILL, *as Mayor, et al., Appellants*.

24	469
31	541
24	469
33	194
24	469
34	641
34	642

APPEAL — RECORD — IDENTIFICATION WITHOUT JUDGE'S CERTIFICATE.

An agreed statement of facts upon which a cause had been tried will not be stricken on appeal for want of the trial judge's certificate, when it is sufficiently identified by the court's findings and by the accompanying record.

SAME — ERRONEOUS FINDINGS — HARMLESS ERROR.

An erroneous finding of fact by a court, which does not materially affect the merits of the controversy, does not constitute prejudicial error.

APPEAL BOND — WHEN NOT REQUIRED OF PUBLIC OFFICERS.

Public officers need not furnish an appeal bond, when they appeal in behalf of public corporations which by law are exempted from the necessity of furnishing such a bond.

MUNICIPAL CORPORATIONS — CONTRACTS — WHETHER PAYABLE OUT OF INDEBTEDNESS OR CURRENT EXPENSE FUND — CONSTRUCTION OF STATUTE.

Under Laws 1897, p. 222, requiring cities of less than 20,000 inhabitants to maintain a "current expense fund," corresponding to what had theretofore been known as the "general fund," and an "indebtedness fund" against which should be chargeable "all outstanding warrants, certificates and all other obligations

and indebtedness of the city, for the payment of which no provision is made by law," the indebtedness described as "all other obligations and indebtedness" must be construed as limited to the same class as the particular words which precede, and hence where plaintiff had a claim creating a general liability of the city, but the amount of which was not finally fixed and ascertained at the date of the creation by law of the indebtedness fund, plaintiff could compel by writ of mandate the issuance to it of warrants upon the current expense fund in payment of the indebtedness due it.

Appeal from Superior Court, Jefferson County.—Hon. FRANK T. REID, Judge. Affirmed.

A. W. Buddress, for appellants.

Harry Ballinger, for respondent.

PER CURIAM.—This action was begun by the respondent in the superior court of Jefferson county, for the purpose of procuring a writ of mandate against the appellants, as the mayor and clerk, respectively, of the city of Port Townsend, requiring them to issue to the respondent warrants drawn upon the current expense fund of said city to pay the balance due respondent from the city on a judgment, and also a claim subsequently allowed by the city council, all of which was for street lights furnished under a contract between respondent and said city. The court granted a peremptory writ of mandamus, and from such judgment the defendants have appealed to this court.

The case was heard below upon an agreed statement of facts, and without the introduction of any evidence other than that shown in such agreed statement. Respondent has moved to strike such statement on the ground that it is not certified by the judge who tried the cause, but we think it is sufficiently identified by the court's findings and by the accompanying record to warrant us in denying the motion.

Respondent's motion to dismiss the appeal for want of

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an appeal bond is also denied, as we believe the better reason lies in favor of the rule that public officers appealing in behalf of political corporations exempted by law need not furnish an appeal bond. The action is brought against the appellants as officers of the city, and not in their individual capacity. We think it is clear that the city is the real party in interest, and therefore the same exemption applies here that would have applied had the city itself been the appellant. In support of this view, see citations in 1 Enc. Pl. & Pr. pp. 968, 969; also *Lamberson v. Jefferds*, 116 Cal. 492 (48 Pac. 485).

This case has been exhaustively argued upon the merits in the briefs of the respective counsel, and numerous suggestions and citations of authorities have been made by each. A comprehensive review of them all would require more space than we deem necessary for the determination of the case. From the facts as found, the court found, as a conclusion of law, that respondent was entitled to a peremptory writ of mandate commanding appellants to issue warrants upon the current expense fund of said city for the amount of respondent's claims, and judgment was entered accordingly. Appellants except to the court's twenty-second finding of fact, which is "that, aside from said delinquent taxes, said indebtedness fund cannot raise a revenue by taxation greater than about the sum of \$5,000." Based upon the agreed statement of facts, the amount found is doubtless an error, as the sum would probably be about \$9,000. But, since the last-named sum is less than the annual interest charge against said fund, we do not think the error materially affects the merits of this controversy. We do not deem it necessary to discuss the other exceptions specifically, since we believe the remaining findings challenged are substantially in accord with the agreed statement of facts.

The remaining question is, did the court err in its conclusion of law? In *Townsend Gas & Electric Co. v. Port Townsend*, 19 Wash. 407 (53 Pac. 551), this court held that the charter provision in the law of 1881 under which the city of Port Townsend was incorporated, and which authorized the creation of a light fund by special taxation, is simply permissive, and is not restrictive of the power to contract for general liability. This contract was general in its terms, and undoubtedly created a general liability, as held in the last-named case. The power to continue the special light fund was lost by the city when it reincorporated in 1896. Appellants' contention that these claims should be paid from such light fund cannot prevail, because neither is such fund in existence, nor can it be created. Since the act of 1897 (Laws 1897, p. 222), cities of the class of Port Townsend are required to maintain a "current expense fund" and an "indebtedness fund." Appellants contend that, if respondent's claims are not to be paid from a special light fund, they must be paid from the indebtedness fund, because the obligation was incurred prior to February 1, 1898, when the indebtedness fund was established, on the theory that all obligations incurred before said date can only be paid from said fund. If the law of 1897 required the payment of these claims from the indebtedness fund, we believe it would be void, as to this particular contract, as impairing its obligations. The court's findings, as well as the agreed statement of facts, show the indebtedness fund of the city to be incumbered by about \$90,000 of outstanding warrants which were not chargeable to any general fund of the city prior to the performance of the services by respondent under its contract. Respondent's remedy under its contract was for payment from the general fund, and if it should now be sent to the indebtedness fund for

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payment, after the city resisted and litigated its claims, as shown by the record, pending which resistance this large judgment incumbrance attached, it would seem to us not only unconscionable and inequitable, but would so greatly lessen the value of respondent's remedy as to clearly impair its contract. Any construction, even though not the most obvious, which will sustain a law, will be preferred to a construction which will render it unconstitutional. Cooley, *Constitutional Limitations* (5th ed.), 220. The indebtedness chargeable against the indebtedness fund as provided by § 5 of the act of 1897 embraces all "warrants, certificates and all other obligations and indebtedness of the city, with the interest thereon, for the payment of which no provision is made by law, by the levy of a special tax," etc. Applying the rule of construction that particular words in a statute followed by general words limit the general to the same class as the particular, the words "all other obligations," etc., would be limited to obligations and indebtedness of the same class as those represented by warrants and certificates, viz. liquidated and ascertained obligations,—indebtedness not requiring any act to fix the liability of the city; and such obligations should be fixed and ascertained at the time of the institution of the fund. We think it our duty to so construe the statute. Respondent's claims were not finally fixed and ascertained at the time of the institution of the fund, but were still in dispute, and a large portion thereof in litigation. We therefore conclude that respondent is entitled to have its claims paid in warrants upon the current expense fund, and that the peremptory writ of mandate was properly issued.

The judgment is affirmed.

[No. 3754. Decided April 6, 1901.]

RACHAEL C. JOHNSON, *Appellant*, v. HARL J. COOK *et al.*, *Defendants*, J. W. CHAPMAN, *Respondent*.

BONDS — ACTION FOR BREACH — WHETHER DAMAGES LIQUIDATED OR IN NATURE OF PENALTY.

A bond in the sum of \$3,000, conditioned that the obligor shall build or cause to be built upon certain premises within a given time a house which shall cost not less than \$2,000, and that he will pay all liens or incumbrances thereon which may be, or threaten to become, prior to a mortgage thereon in favor of the obligee, contemplates that the sum named in the bond shall be in the nature of a penalty and not liquidated damages.

SAME — WHEN GIVEN AS GUARANTY — LIABILITY AFTER EXHAUSTION OF PRIOR SECURITY.

Where a bond conditioned that the obligor will build a house of an agreed value upon mortgaged premises within a stipulated time is given as additional security for the mortgage thereon, in an action on the bond for breach of the condition to build the obligee is not entitled to other than nominal damages, when the mortgaged premises have not been sold under foreclosure and the amount of deficiency determined.

APPEAL — REFUSAL TO ALLOW NOMINAL DAMAGES — HARMLESS ERROR.

Although error may have been committed in giving defendant judgment on the pleadings, in an action for damages for breach of a bond, when the pleadings show plaintiff entitled to nominal damages, yet the cause should not be reversed merely that nominal damages may be assessed, as no substantial right is affected by the error.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Samuel R. Stern, for appellant.

F. T. Post, for respondent.

The opinion of the court was delivered by

MOUNT, J. This action was brought by plaintiff against defendants to recover upon a bond. The com-

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plaint, omitting the formal parts and paragraphs not necessary to a determination of the questions presented here, is as follows:

"1. That the defendants Harl J. Cook and Mara S. Cook being desirous of obtaining a loan from the plaintiff, for the sum of \$3,750, and which said loan was to be secured by a mortgage upon various lots situated in Liberty Park addition, and upon lot 15, block 3, Cook & Byer's addition to the city of Spokane, Wash., as an inducement to the plaintiff to make the said loan aforesaid said defendants agreed to construct upon lots 22 and 23 of block 6, in Liberty Park addition to the city of Spokane, Washington, and which said lots were included in said mortgage, a house which, exclusive of the foundation then built thereon, was to cost not less than the sum of \$2000, and to be completed within six months from said April 26, 1892.

"3. That to insure the erection and completion of said house, which was to cost the sum of \$2,000, and to be completed within the six months hereinbefore referred to, and to secure this plaintiff against any loss or damage on account of the failure to thus build said house, and to expend the said sum of \$2,000 in the building thereof, the defendants herein, in consideration of making said loan and the advancement of the sum of \$3,750 by this plaintiff, made, executed and delivered to the plaintiff, their written obligation as follows, to-wit:

"Know all men by these presents: That we, Harl J. Cook and Mara S. Cook, his wife, as principals, and J. W. Chapman and E. M. Lownes, as sureties, are holden and firmly bound unto Rachel C. Johnson of New York City in the sum of Three Thousand Dollars, for the payment of which to the said Rachel C. Johnson, or her executors, administrators, or assigns, we hereby jointly and severally bind ourselves, and our heirs, executors, and administrators firmly by these presents.

"The condition of this obligation is such that if the above bounden Harl J. Cook and Mara S. Cook shall well and truly build, or cause to be built, a house upon the premises known as lots 22 and 23 of block 6, in Liberty

Park addition (so-called), within six months from date hereof, and to be completed within said time, and which shall cost not less than the sum of two thousand dollars; and shall well and truly pay, or cause to be paid, all liens, incumbrances, claims, or demands of any kind, name, or nature against the said property which may be prior, or threaten to become prior, liens or claims to the mortgage of the said Rachel C. Johnson, dated April 11, 1892, and acknowledged on that day, and shall save and keep harmless the said Rachel C. Johnson of and from the payment of all moneys by reason of any liens or incumbrances upon said property existing, or which are likely to exist or be made, against said property, together with any interest paid on any such sums, then this obligation to be null and void; otherwise, to remain in full force and effect.

"In witness whereof we have hereunto set our hands and seals this April 26, 1892.

(Signed)

Harl J. Cook.

Mara S. Cook.

J. W. Chapman.

E. M. Lownes.

"Signed and sealed

in presence of

Martin B. Connelly.

Walter E. Mariner.'

"4. That said plaintiff, relying upon said agreement, advanced to the defendants Cook the sum of \$3,750, but neither of said Cooks, nor any one else for or in their behalf, erected, within six months from said April 26, 1892, or have ever erected, a house upon the said premises hereinbefore described, and the said premises have remained in the same condition that they were in at the time said agreement was entered into.

"5. That no part of the said sum of \$3,750 has ever been paid, nor the sum of \$3,000 agreed to be paid by virtue of the instrument hereinbefore set out, this to the damage of this plaintiff in the sum of \$3,000 with interest thereon from April 26, 1892, at the rate of 10 per cent. per annum."

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Defendant Chapman, answering separately, denied the paragraphs above mentioned, except that he admitted the execution of the bond, and that the house named therein was never erected; and, further answering, alleged:

"1. That this plaintiff loaned said defendants Cook the sum of three thousand seven hundred fifty (\$3,750) dollars, taking as security therefor a mortgage on various lots in Liberty Park addition to the city of Spokane, in said county, and the said parties Cook also agreed to construct a house upon lots twenty-two (22) and twenty-three (23) of block six (6) of said addition, being two of the lots described in said mortgage, and the bond set out in the complaint was given as additional security for said loan.

"2. That the plaintiff did, on various occasions, give extensions of time to said defendants Cook for the payment of their said indebtedness, and parts thereof, without the knowledge or consent of this defendant, to his damage and injury and thereby released this defendant as a surety upon any and all obligations under said bond."

And further alleged:

"5. For further answer, and by way of defense, this defendant alleges, that an action has been commenced by the plaintiff and is now pending in the above entitled court for the foreclosure of the mortgage referred to in the complaint; that the property described in said mortgage is of great value, and, in case a decree of foreclosure is granted, may sell for enough to pay said indebtedness in full."

Plaintiff in her reply admitted paragraphs 1 and 2 of the fourth defense and all of the fifth defense, except that the property was of great value, and alleged that the same was not worth to exceed \$1,000. When the cause was called for trial, defendant moved for judgment upon the pleadings, which motion was by the court sustained, and judgment of dismissal entered. Plaintiff appeals.

The principal question presented upon this appeal is

whether the sum named in the bond, viz., \$3,000, is a penalty or liquidated damages. If the said sum named is liquidated damages, the plaintiff is entitled to recover the whole thereof; if a penalty, she is entitled to recover the actual damages suffered by reason of the violation of the terms of the bond. The pleadings concede the execution of the bond and its violation; also that the mortgage given at the time the bond was given had not, at the time of the bringing of this action, been foreclosed. The complaint was prepared upon the theory of liquidated damages. Mr. Pomeroy, in his work on Equity Jurisprudence, after stating that it is well settled that if the intent of the parties to the contract is at all doubtful, the tendency of the courts is in favor of the interpretation which makes the sum a penalty, and that it is impossible to formulate a general rule by which the question of penalty or liquidated damages can be determined in every instance, gives the following as rules which have been established by judicial authority:

“First. Wherever the payment of a smaller sum is secured by a larger, the larger sum thus contracted for can never be treated as liquidated damages, but must always be considered as a penalty.

“Second. Where an agreement is for the performance or non-performance of only one act, and there is no adequate means of ascertaining the precise damage which may result from a violation, the parties may, if they please, by a separate clause of the contract, fix upon the amount of compensation payable by the defaulting party in case of a breach; and a stipulation inserted for such purpose will be treated as one for ‘liquidated damages,’ unless the intent be clear that it was designed to be only a penalty.

“Third. Where an agreement contains provisions for the performance or non-performance of several acts of different degrees of importance, and then a certain sum is stipulated to be paid upon a violation of any or of all

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such provisions, and the sum will be in some instances too large and in others too small a compensation for the injury thereby occasioned, that sum is to be treated as a penalty, and not as liquidated damages. . . .”

“Fourth. Whether an agreement provides for the performance or non-performance of one single act, or of several distinct and separate acts, if the stipulation to pay a certain sum of money upon a default is so framed, is of such a nature and effect that it necessarily renders the defaulting party liable in the same amount at all events, both when his failure to perform is complete, and when it is only partial, the sum must be regarded as a penalty, and not as liquidated damages. . . .”

“Fifth. Finally, although an agreement may contain two or more provisions for the doing or not doing different acts, still, where the stipulation to pay a certain sum of money upon a default attaches to only one of these provisions, which is of such a nature that there is no certain means of ascertaining the amount of damages resulting from its violation, or where all of the provisions are of such a nature that the damages occasioned by their breach cannot be measured, and a certain sum is made payable upon a default generally in any of them,—in each of these cases, the sum so agreed to be paid may be considered as liquidated damages, provided, of course, that the language of the stipulation does not bring it within the limitations of the preceding fourth rule. . . .” *Pomeroy, Equity Jurisprudence*, §§ 441-445.

It seems from these rules that where the damages are uncertain, and cannot be determined with accuracy, then the sum named in the bond may be considered as liquidated damages. This case certainly does not fall within this rule, because a house costing \$2,000 would certainly be worth no more than it cost, and “liens, incumbrances, claims, and demands” must of necessity become certain and capable of accurate determination. These items are not like damages arising from loss of business occasioned by failure to deliver certain goods at a particular time or

place, or like damages arising from delay in performing contracts and items of this nature. The agreement, then, must fall within one of the rules which construes the same to be a penalty, and we have no doubt that the fourth rule fully covers the contract in question here. This bond provides for the erection of a house costing not less than \$2,000, and also for the payment of liens, etc. After the house had been erected it was still the duty of the obligors to pay the liens, etc., and a violation of any of these obligations would have subjected defendants to the same kind of an action; for the bond cannot be interpreted to be for "liquidated damages" as to the house, and for a "penalty" as to the other liens. The complaint makes no allegation of any breach except the failure to erect the house; presumably there was no other. If the house had been erected as provided, and \$100 in liens filed against the property, could any one seriously contend that the defendants would be liable for \$3,000 under the bond, because of failure to pay \$100? Assuredly not. And yet this principle must apply with less force, when it is claimed, as here, that for failure to erect the house defendants must pay \$3,000. Plaintiff alleges in paragraph 3 that the bond was executed and delivered to secure the erection and completion of the house, "and to secure this plaintiff against any loss as damages on account of the failure to thus build said house." If there could be any doubt as to whether or not the sum named should be construed to be a penalty, this allegation would certainly settle the doubt in favor of such construction. The sum named in the bond must be held to be a penalty. See, also, 1 Sedgwick, Damages (8th ed.), § 408 *et seq.*; 2 Story, Equity Jurisprudence (13th ed.), § 1314 *et seq.*; 1 Sutherland, Damages (2d ed.) § 283 *et seq.*; *Long v. Pierce County*, 22 Wash. 330 (61 Pac. 142).

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The sum named in the bond being a penalty, it follows that, in order to recover upon it, the plaintiff must show by his complaint some damages occasioned by the breach of the conditions. It is true that this complaint, in addition to the allegation of a breach, also alleges non-payment of any part of the money borrowed for which the bond was given as additional security, and "this to the damage of plaintiff in the sum of \$3,000." It also appears from all the pleadings, and is admitted in the argument, that the plaintiff loaned the defendants the said sum of \$3,750, taking a mortgage upon certain lots in Spokane as security therefor, and that the bond sued on herein was an additional security for the payment of that sum of money. It is also admitted that the mortgage has not yet been foreclosed. The defendant in his answer alleges: "The property described in said mortgage is of great value . . . and may sell for enough to pay said indebtedness in full." Plaintiff alleges in reply that said property is not worth to exceed \$1,000. Under these allegations, it follows that before foreclosure and sale the damages in this case must be more or less speculative; that the amount thereof may be determined with accuracy only after the other security is exhausted. When the mortgaged property is sold, if money enough is realized therefrom to pay the mortgage with interest and costs, then there is no liability under the bond. If, on the other hand, the mortgaged property sells for less than the sum borrowed, with interest and costs, plaintiff's damage is readily and certainly determined. In justice to defendants, it seems that plaintiff should exhaust her mortgage security so as to remove the uncertainty and speculation as to the value of the security. Under the terms of the bond, defendants were bound to build a house costing not less than \$2,000 within six months from April

26, 1892. This they failed to do. By failure to comply with this obligation they guaranteed, to the extent of the value of the property with the house, the payment of the original debt. Surely, it could not be reasonably contended that there was any greater liability than this. Relative to a guarantor, the weight of authority is that, where a third party guarantees the payment of a note secured by mortgage, he is not liable on the guaranty until after resort is had to the mortgage security. 2 Sutherland, Damages (2d ed.), § 734; 14 Am. & Eng. Enc. Law (2d ed.), 1155; *Barman v. Carhartt*, 10 Mich. 338; *Johnson v. Shepard*, 35 Mich. 115; *Dewey v. W. B. Clark Investment Co.*, 48 Minn. 130 (50 N. W. 1032, 31 Am. St. Rep. 623); *Newell v. Fowler*, 23 Barb. 628.

We do not mean by this to hold that the complaint fails to state a cause of action; for here the complaint alleges a contract and breach, from which nominal damages must be presumed. *Pollard v. Porter*, 3 Gray, 312.

Appellant insists that, because nominal damages could be recovered, the cause should be reversed for a new trial, for the reason that this court will consider all amendments which could have been made as made. In this cause the only amendment which could be made to bring the case within the rules herein announced is an allegation of the worthlessness of the security or that the foreclosure has already been made with loss. Neither of these allegations can be made under the pleadings, because both are negatived by the plaintiff.

If the court erred in dismissing the cause, the error did not affect a substantial right, and the cause will not be reversed merely that nominal damages may be assessed. *State v. French*, 60 Conn. 478 (23 Atl. 153); *Coffin v. State*, 144 Ind. 578 (43 N. E. 654, 55 Am. St. Rep. 188); *McIntosh v. Lee*, 57 Iowa 356 (10 N. W.

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895); *Glasscock v. Rosengrant*, 55 Ark. 376 (18 S. W. 379); *McConihe v. New York & Erie R. R. Co.*, 20 N. Y. 495 (75 Am. Dec. 420).

Under this view of the case it is unnecessary to discuss the other questions presented in the briefs.

The judgment is affirmed.

REAVIS, C.J., and FULLERTON, DUNBAR and ANDERS, JJ., concur.

[No. 3554. Decided April 8, 1901.]

YESLER ESTATE, INCORPORATED, *Respondent*, v. ADAM ORTH, *Appellant*.

24	483
35	143

UNLAWFUL DETAINER — WHEN CAUSE OF ACTION ARISES.

Under Bal. Code, §5527, which provides that a tenant of real property is guilty of unlawful detainer, when he, having leased real property for an indefinite time, with monthly rent reserved, continues in possession thereof after the end of any such month, in cases where the landlord, more than twenty days prior to the end of such month, shall have served notice requiring him to quit the premises at the expiration of such month, an action of unlawful detainer will lie against a tenant from month to month, who continues in possession after the end of a month, when notice to quit had been given to him more than twenty days prior thereto.

Appeal from Superior Court, King County.—Hon. WILLIAM HICKMAN MOORE, Judge. Affirmed.

Fred. H. Peterson, for appellant.

Struve, Allen, Hughes & McMicken, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—Action of unlawful detainer. The material allegations of the complaint are that on the 15th of October, 1898, plaintiff was, and at all times since

has been, the owner and entitled to the possession of certain described real property in Seattle; that at the date mentioned, and for some time prior thereto, the defendant, as the tenant of the prior owners of such property, was in possession of a portion thereof,—a certain store room; that about the 15th of October, 1898, it was orally agreed between plaintiff and defendant that defendant should continue in the use and occupancy of such store room from month to month as the tenant of plaintiff, at an agreed rental payable on the first day of each month in advance, and that defendant continued in the possession of the premises as the tenant of plaintiff at the agreed rental for the unexpired term of the month of October, 1898, and for each succeeding calendar month to and including the month of May, 1899; that defendant still continues in the possession thereof; that on the 8th of May, 1899, plaintiff served a notice in writing to the defendant, in substance as follows:

“You are notified to leave the described premises at the expiration of the present month of your tenancy, May 31, 1899, and that your tenancy will be and is hereby terminated at the expiration of said month of May, 1899.”

It is averred that, upon the expiration of the said month of May, plaintiff demanded of defendant to quit and surrender possession of the premises to plaintiff, but defendant neglected and refused to quit or surrender. There is an allegation of damages sustained by the unlawful detainer by defendant. There was judgment for plaintiff. No bill of exceptions or statement of facts is in the record. The only question suggested by counsel for defendant is the sufficiency of the complaint; that is, it is urged that the complaint does not state facts sufficient to constitute a cause of action. The law governing actions for forcible detainer and unlawful de-

April, 1901.] Opinion of the Court—FULLERTON, J.

tainer is found in § 5527, Bal. Code, and following sections, and is controlling. The defendant, when he continued in possession after the end of the month of May, having been given notice to quit more than twenty days prior thereto, was guilty of unlawful detainer. The complaint states a cause of action, and the judgment is affirmed.

FULLERTON, DUNBAR, ANDERS and WHITE, JJ., concur.

[No. 3594. Decided April 8, 1901.]

A. L. DENIO, *Respondent*, v. EDGAR V. BENHAM, *Appellant*.

24 485
330 176

JUDGMENTS — REVIVOR — PARTIES.

Code Proc. § 462, subd. 1, which requires a motion to revive a judgment to "state the names of the parties to the judgment," does not contemplate that the motion state the names of the parties to the action in which the judgment was rendered, but is satisfied by a statement showing the parties in whose favor, and against whom, the judgment runs.

Appeal from Superior Court, Pacific County.—Hon. HENRY S. ELLIOTT, Judge. Affirmed.

Remington & Reynolds, for appellant.

Hewen & Stratton, for respondent.

The opinion of the court was delivered by

FULLERTON, J.—This is an appeal from an order reviving a judgment entered in a proceeding had pursuant to §§ 462, 463 of 2 Hill's Code. The principal contention of the appellant is that these sections of the Code were repealed by the act of March 6, 1897 (Session Laws 1897, p. 52), and hence there is no method of continu-

ing the life of a judgment beyond the statutory period of limitation other than by a common-law action upon the judgment. Since this appeal was taken, this court has met and decided this question adversely to the appellant's contention in the case of *Palmer v. Laberee*, 23 Wash. 409 (63 Pac. 216). The reasons for the conclusion reached are fully stated in the opinion in that case, and it is unnecessary to repeat them here. It is sufficient to say that we are satisfied with the rule there announced.

It is next contended that the motion to revive is fatally defective because it does not "state the names of the parties to the judgment," as required by the statute (subd. 1, § 462, 2 Hill's Code). The motion is entitled as in the original cause, and recites: "Comes now the intervenor, A. L. Denio, in the above entitled cause, and shows to the court that on the 13th day of February, 1894, intervenor recovered a judgment against the defendant, Edgar V. Benham, in the cause aforesaid, in the sum of," etc. This, we think, was a sufficient compliance with the statute. The requirement is not that the motion state the names of the parties to the action in which the judgment was rendered, but is that it state the names of the parties to the judgment; and this the motion does.

The order is affirmed.

DUNBAR and ANDERS, JJ., concur.

REAVIS, C. J., concurs on the authority of the case cited, but not as a principle of original construction.

April, 1901.] Opinion of the Court—REAVIS, C. J.

[No. 3598. Decided April 8, 1901.]

24 487
34 146

N. BOARDMAN, *Respondent*, v. A. W. HAGER *et al.*, *Appellants*.

INTERVENTION — GROUNDS OF — ISSUE AFFECTING LAND IN OTHER COUNTY.

In an action to compel the issuance to plaintiff of stock in a mining company, wherein a complaint in intervention claiming an interest in a portion of the same stock is filed, the intervenor cannot ask for the rescission of a contract of conveyance of land in another county because of the fraud of one of the defendants in procuring a transfer of such stock in consideration of said conveyance.

APPEAL — STRIKING ALLEGATIONS OF ANSWER — CURED BY ADMISSION OF EVIDENCE.

Error of the court in striking a portion of the answer of defendants in not prejudicial when testimony in support of the stricken matter is subsequently admitted.

SAME — SUFFICIENCY OF EVIDENCE.

Where there is a substantial conflict in the testimony, the findings of the trial court will not be disturbed on appeal.

Appeal from Superior Court, King County.—Hon. WILLIAM HICKMAN MOORE, Judge. Affirmed.

Milo A. Root, for appellant Pulver.

G. W. Somerindyke, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—Respondent commenced this suit to compel the issuance to himself of a balance of 93,143½ shares of the stock of the Golden Tunnel Mining Company, which he claims to be due him pursuant to a written agreement. His complaint alleges, in substance: That at Seattle, on the 6th of December, 1898, respondent and John Thomas paid the defendants Hager and Gardner the sum of \$700, in consideration of which the said

defendants, Hager and Gardner, agreed with respondent in writing; and the instrument is set out as follows:

“Seattle, Washington, Dec. 6th, 1898.

“In consideration of Seven Hundred Dollars (700), in hand paid, and the further consideration hereinafter mentioned we consent to incorporate immediately The Golden Tunnel Group of mining claims on a capitalization of One Million (1,000,000) Dollars.

Two Hundred Thousand Dollars of said stock to be placed in the Treasury. Sixty Thousand (60,000) shares of said Treasury stock to be used for the purpose of paying to Gardner and Hager, or whom they may direct, the sum of Seven Thousand and Three Hundred Dollars, (\$7,300). On the payment of said Seven Thousand and Three Hundred Dollars (\$7,300), to Gardner and Hager, or whom they direct, they, the said Gardner and Hager, will cause to be issued of the capital stock of said company One Hundred and Seventy-five Thousand shares (175,000) to John Thomas, and One Hundred and Seventy-five Thousand shares (175,000) to N. Boardman, or whom they may direct.

Geo. T. Gardner.
A. W. Hager.”

That pursuant to such agreement, and for the purpose of carrying out its provisions, the defendant the Golden Tunnel Mining Company was incorporated, and the mining properties mentioned therein transferred by the defendants Hager and Gardner to the corporation, and accepted by it subject to the terms of the agreement. That such agreement was duly ratified by the corporation and the provisions complied with by the corporation, save the issuance of the full amount of stock due respondent. That the corporation defendant issued to respondent 81,856½ shares of stock, leaving a balance due him of 93,143½ shares of stock in the company. That since the incorporation of the company Hager has been, and now is, manager, and Gardner secretary, of the company, and they own the ma-

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jority of the stock and controlling interest therein. The defendant answered, denying generally the allegations of the complaint, and then set out that the proposition mentioned in the complaint was first made orally by defendants Gardner and Hager to John Thomas, C. W. Yancy, and George Pulver, except that the name of N. Boardman was not in the oral proposition, but the names of Yancy and Pulver; that the said oral proposition was accepted by Thomas, Yancy and Pulver; that Yancy requested that the proposition be put in writing, and that the name of Boardman should be used, instead of the names of Yancy and Pulver, which request was granted; that Boardman was not a party to the contract, or the negotiations out of which the same arose; that pursuant to the request and consent of Yancy and Pulver these defendants have issued upon the order of Boardman 82,950½ shares of stock. These allegations were, upon motion, stricken by the court. The answer further alleged that Thomas, Yancy, and defendants Gardner and Hager entered into an agreement among themselves to set aside a certain amount of stock that the company should sell to meet a claim of one Olson against the company; that it was so agreed by Yancy and Boardman that 25,287 of the 175,000 shares mentioned in the written proposition to be issued to Boardman should be so set aside and held by the company for such purpose. This allegation of the answer was substantially admitted at the trial. The answer further alleged that in June, 1899, Pulver orally notified defendants not to issue to Boardman, or any one, except on his (Pulver's) order, more than one-half of the 175,000 shares of stock mentioned in the proposition as to be issued to Boardman, and Pulver claimed to be owner and entitled to the one-half of the 175,000 shares less the amount set aside to meet Olson's claim; and defendants

aver there is a balance of 67,856½ shares of stock which defendant company is ready to issue at any time to whomsoever the court shall say is entitled to receive the same. Appellant Pulver also filed a complaint in intervention, alleging generally that in December, 1898, himself and Yancy, as co-partners, were negotiating with defendants Gardner and Hager for the purchase of 350,000 shares of stock of the proposed corporation, one-half of which was to go to John Thomas and the other half to Yancy and Pulver, and that defendants Gardner and Hager orally agreed to sell said 350,000 shares of stock to Thomas and Yancy and Pulver upon the terms and conditions subsequently contained in the proposition stated in plaintiff's complaint; that, when said agreement was orally made, Yancy requested Gardner and Hager to put said proposition in writing, and, while the same was about to be put in writing, Yancy requested that the name of Boardman should be placed in the proposition, instead of the names of Yancy and Pulver, giving as a reason for said request that Yancy was financially embarrassed, and did not want any writing or contract in his own name; that intervenor was not present, and Yancy stated that he was representing the firm of Yancy & Pulver in closing up the negotiations; that intervenor never authorized the name of Boardman to be used, instead of Yancy and Pulver, and did not know it had been used until long afterwards; that Boardman had no connection with the negotiations or with the acceptance of the proposition made by Gardner and Hager; that it was understood by all parties that the name of Boardman was used in lieu of Yancy and Pulver, as a mere matter of personal accommodation to Yancy; that during all the negotiations it was understood that Yancy and intervenor should have 175,000 shares of stock to be issued in equal shares to each,—87,500 shares to Yancy

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and 87,500 shares to intervenor; that Yancy told intervenor that he made the agreement so that the stock could be issued in the name of Boardman; that intervenor never ratified the arrangement made by Yancy to insert Boardman's name in the agreement. Intervenor also alleges that, while Yancy was his partner in the real estate and mining brokerage business, Yancy sold to intervenor a tract of land in Skagit county, alleged to contain an extensive vein of coal, and very valuable, in consideration of 40,000 shares of stock of the company owned by intervenor; that the deed of conveyance to the land was executed by one Platt Durand and wife in January, 1889, and that intervenor gave Yancy an order for 40,000 shares of the stock, the stock being worth at the time \$6,000; that intervenor had never examined the land, and that Yancy's representations as to its containing coal and value were false and fraudulent, and that it was in fact without any considerable value. Intervenor prayed that Yancy and Durand and wife be brought into the action as parties, and that the court decree the sale of the stock to have been to Yancy and intervenor in equal shares; that intervenor have his proportion of the stock issued to himself; that the sale from Yancy to intervenor of the real estate in Skagit county be declared fraudulent. Defendants moved for an order requiring plaintiff to bring into the action Yancy and Durand and wife. A demurrer was sustained to those allegations of the complaint in intervention with reference to the alleged fraudulent sale of lands in Skagit county and the transfer of the 40,000 shares of stock from intervenor to Yancy. Evidence was heard upon the other issues made by the pleadings.

We are not inclined to disturb the court's rulings upon the demurrer to the allegations of fraud and the claim for rescission and further relief stated in the complaint in

intervention relating to the Skagit land transaction. In view of the testimony admitted subsequently, the striking from the answer of the defendants of the allegations in paragraphs 2, 3, and 5 seems to become practically immaterial. The court heard all the testimony on the part of the defendants relative to oral agreements preceding the execution of the written agreement set out in the complaint. The testimony of the witness Yancy and that of the intervenor, Pulver, were substantially in conflict, and there is some conflict between the other witnesses. Yancy maintained that the firm of Yancy & Pulver were brokers, and were to receive 100,000 shares of stock for negotiating the sale of the 350,000 shares made to Thomas and Boardman for \$700. Intervenor, Pulver, who testified, also maintained that Boardman's name in the written contract was, for convenience, used in place of Yancy and Pulver, and those shares of stock were to belong to Yancy and Pulver. It appeared as a fact that Thomas paid \$350 and Boardman \$350, which constituted the \$700 paid for the \$350,000 worth of stock. This block of stock seems to have been sold by defendants Gardner and Hager for the purpose of paying debts of the company and procuring the \$700 in cash as a working fund to organize the contemplated corporation. Gardner and Hager each, in testifying, declared that he knew nothing of Boardman's connection with the purchase of stock. This was, however, knowledge which it was unnecessary for them to have. They were not interested in the individuals who purchased the stock from Yancy & Pulver, their brokers. The court found that Yancy was the agent of Boardman. The \$350 purchase price was paid by Thomas, who advanced the same for Boardman at the request of Yancy, which \$350 was paid to Thomas out of rents arising from property owned in Seattle by Boardman, which were collected by

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Thomas. After a careful examination of the evidence contained in the record, it is concluded we ought not to disturb the findings of the superior court. The virtual dismissal of the complaint in intervention leaves the rights of the intervenor and Yancy as between themselves undetermined.

The judgment is affirmed.

DUNBAR, FULLERTON, ANDERS and WHITE, JJ., concur.

[No. 3633. Decided April 8, 1901.]

CITY OF NEW WHATCOM, *Defendant and Appellant*, v.
FAIRHAVEN LAND COMPANY, *Plaintiff and Respondent*.

WATERS AND WATERCOURSES — DIVERSION FOR MUNICIPAL PURPOSES —
RIGHTS OF RIPARIAN PROPRIETOR.

The right which a lower riparian proprietor has to the usual and undiminished flow of the water in the stream running through or by his land is property, of which he cannot be deprived without the exercise of the power of eminent domain and the payment of just compensation, even where the upper proprietor is a municipal corporation which seeks to divert the waters for a necessary public use.

Appeal from Superior Court, Whatcom County.—Hon. JESSE P. HOUSER, Judge. Affirmed.

C. H. Hurlbut, T. E. Cade and O. B. Barbo, for appellant.

Kerr & McCord, for respondent.

The opinion of the court was delivered by

WHITE, J.—This action was originally instituted in the district court of the Territory of Washington on the 8th day of August, 1889, by the Fairhaven Land Company, as plaintiff, against the Bellingham Bay Water Company,

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as defendant. The object of the action was to restrain and enjoin the Bellingham Bay Water Company, as a private corporation engaged in the business of supplying the inhabitants of the town of Whatcom with water for general domestic and municipal use, from diverting the waters of Whatcom creek from its natural bed for that purpose. Whatcom creek is the only outlet of Lake Whatcom, and flows from said lake, which is situated about three miles to the southeastward of its outlet, in a fixed and well defined channel, and has a fall from the lake of three hundred eighteen feet, and is not in any sense a navigable stream. Lake Whatcom is the source of Whatcom creek, and is a large, navigable, fresh-water lake, with an area of about seven and one-half miles, or about 5,000 acres, and is a meandered lake. Whatcom creek empties into Bellingham Bay, a part of Puget Sound. In the descent of the creek to Bellingham Bay there are a series of falls, the last of which is about twenty-five feet in height and the bottom of which is on a level with the tidal waters of Bellingham Bay. This last waterfall is immediately below a milldam used by the plaintiff in propelling a sawmill. There is a constant flow of water through the channel of the creek, which varies with the seasons. The capacity of the mill is about 75,000 feet of lumber per day. The natural flowage of the creek, undiminished by any diversion, is insufficient during the dry season of each year to operate the mill all the time. During the rainy season the flow of water through the creek aggregates about 100,000,000 gallons per day, and during the dry season the average flowage is from 5,000,000 to 8,000,000 gallons per day. To operate the sawmill and the water wheels connected therewith about 2,500,000 gallons per hour is required. In 1853 one Russell V. Peabody entered, under what is known as the "Donation Act," a part of the N. W.

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$\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 30, township 38 north, of range 3 east. The plaintiff's mill is situated on a tract of land at the mouth of Whatcom creek, which is a part of the Peabody donation claim. The plaintiff is the owner of the lands at the mouth of the creek, and is the lowest riparian owner thereon, and its lands include the bed of the creek for a distance of about one-half mile upward from where the creek empties into Bellingham Bay. In the year 1854 Peabody and others associated with him erected on the tract now owned by the plaintiff a sawmill and operated it by water power from Whatcom creek until 1874, when the mill was burned down. In 1882 or 1883 the mill, owned by the plaintiff at the time this action was commenced, was built on plaintiff's land about fifty yards below the old mill site; the office of the new mill being about where the old mill stood. By mesne conveyances from the Peabody heirs and Peabody's associates and their grantees on the 8th day of May, 1889, the plaintiff became the owner of said mill and mill site and has been the owner ever since. The mill built in 1882 is also propelled by water from Whatcom creek. Whatcom creek flows through the Peabody donation claim and said mill tract. Subsequent to the institution of this action the Bellingham Bay Water Company, for the purpose of supplying the people of New Whatcom with water for domestic and municipal purposes, laid its water pipes and mains upon the streets of Whatcom and ran its mains up said Whatcom creek to a point about one-half mile from Lake Whatcom, and above the mill and lands of the plaintiff, and there connected its intake pipes and mains with the channel of said creek and diverted therefrom the water supply for said city of New Whatcom. The present population of New Whatcom is about seven thousand, and it is one of the growing and important cities of Puget Sound.

In 1893, and at the time the Bellingham Bay Water Company's intake pipes were connected with and were in the channel of Whatcom creek, the city of Whatcom purchased said water system from said Water Company; and thereafter the city of New Whatcom extended the water mains from where the intake pipes were located in said creek to and within Lake Whatcom proper and located the intake pipes, which were twenty-four inches in diameter, about one-quarter of a mile from the outlet of the lake, the head of Whatcom creek, placing such intake pipes about six feet below the bed of the creek at its source in the lake, and ever since has maintained said water system, and since such extension of the mains the water supply of New Whatcom has been taken directly from Lake Whatcom, and from no other source whatever. Said lake is the only practical source of water supply for the city of New Whatcom, and each year the necessities of the public and of the inhabitants of the city for supply of water is becoming more important and exacting. The city of New Whatcom has also entered into various contracts and leases with various of its citizens and inhabitants, by which it agreed to furnish and is furnishing such parties, through its water mains, water from Lake Whatcom for power purposes, to enable such parties to operate mills, printing presses, feed mills, electric light plants and various other machinery, and to supply docks, steamers, coal bunkers, etc. The water is also used by the city in operating public fountains, and for public buildings, and in flushing sewers, etc. After New Whatcom purchased said system, an amended complaint was filed in this action and the city of New Whatcom was made a party defendant, and the action was discontinued against the Bellingham Bay Water Company and the city of New Whatcom was substituted for the Bellingham Bay Water Company as

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the sole defendant. Neither the Bellingham Bay Water Company nor the city of New Whatcom at any time instituted any action to condemn, nor have they at any time condemned, plaintiff's property, nor have they taken any action to secure the right to divert the waters of said Whatcom creek or of said Lake Whatcom for public or private use or for any other purpose, nor have they in any manner settled or attempted to settle or adjust any damages that plaintiff has or may suffer by reason of the diversion of said water. The Bellingham Bay Water Company, by lease or otherwise, was the riparian owner of the bed of said creek near the source thereof above the lands and mill site of the plaintiff at the time it put in its water system, and continued so up to the date of the sale of its system to New Whatcom, and the city of New Whatcom succeeded to whatever rights the water company had as such riparian owner; and the water company was a riparian owner on said creek above plaintiff prior to the date of the plaintiff's purchase of the mill and mill tract, and that fact was known to the plaintiff when it purchased. The city of New Whatcom has become the successor of the water company in supplying its inhabitants with water, and the value and use of the water system depends almost wholly upon a source of supply from said lake. If the supply was shut off the entire plant would be rendered valueless, and the people of the city would be greatly injured, and the public health might be endangered. The city of New Whatcom is situated on both sides of the creek, the full length of the creek from its source, taking in a part of Lake Whatcom and to its outlet. Streets and alleys are located and run across, parallel to, and upon the banks and bed of the creek; and the city of New Whatcom is the owner of property on the shores of the lake and in the bed of the creek at its source, and is a riparian owner

on the lake and creek. By constructing a dam at the head of the creek at the foot of the lake the surplus water of the lake during the winter or wet seasons can be stored or retained until the dry weather approaches, and can be used during the summer to keep up and maintain the full natural flowage of the creek during the entire season. It is manifest from the evidence and findings in the case that, by reason of the intake pipes of the water system being laid in Lake Whatcom and the water drawn off thereby, the natural flowage of Whatcom creek is greatly diminished, and that by reason thereof there is not sufficient water at certain seasons of the year to operate the plaintiff's mill as the plaintiff might operate it but for the diversion of the water through the intake pipes of the defendant. The court below held that the diversion of any of the waters from Lake Whatcom, under the water system of the defendant, for the purpose of supplying water and power to the various light plants, wood yards, printing offices, etc., was in violation of the rights of the plaintiff, and that the plaintiff being the lowest riparian owner on the creek and having appropriated the flowage thereof for mill purposes long prior to the attempted diversion of any of the waters of said creek, or of Lake Whatcom, the source of said creek, by the defendant or the water company, such diversion by the defendant was in violation of the rights of the plaintiff; and the court gave to the plaintiff a perpetual injunction against the city of New Whatcom, enjoining and restraining it from diverting any of the waters of said creek, or the waters of said lake, the source of said creek, for any purpose whatever, until such time as the said city should compensate the plaintiff for any damages accruing to it by reason of such diversion. From this decree the city appeals.

The principal contention of the appellant is that the

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state, under art. 17, § 1, of the constitution, is the sole and absolute owner of the bed, the shore to high water mark, and the waters of Lake Whatcom; that the state can use or divert, or authorize the use or diversion of, the waters in the lake for any public purpose; that to supply the inhabitants of a city with water is a public purpose and is a paramount necessity superior to every other use; that the state has authorized such use, and under such authorization the appellant is using the waters of the lake; and that the respondent has no interest in the waters of the lake.

The title to lands under tide waters in the sea, arms, and inlets thereof, and in tidal rivers, within the realm of England, was, by the common law, deemed to be vested in the king, as a public trust, to subserve and protect the public right to use them as a common highway for commerce, trade, and intercourse. The king, by virtue of his proprietary interest, could grant the soil so that it should become private property; but his grant was subject to the paramount right of the public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right. Upon the American Revolution the title and dominion of the tide waters, and of the lands under them, vested in the several states of the Union within their respective borders, subject to the rights surrendered by the constitution to the United States. The new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. *Shively v. Bowlby*, 152 U. S. 1 (14 Sup. Ct. 548); *Sage v. Mayor, etc., of New York*, 154 N. Y. 61 (47 N. E. 1096, 38 L. R. A. 606, 61 Am. St. Rep. 592). Fresh-water lakes in England are private property, and the crown

and public possessed no such rights in fresh-water lakes as they possessed in tide waters. In navigable fresh-water rivers above the flow of the tide the bed of the river belonged to the owners of the adjacent soil to the middle of the stream. In this country the doctrine of private ownership has been generally recognized as the rule of the common law, but it has been held to be inapplicable to the condition of many of those states in which the inland rivers and lakes are large. The provision of art. 17, § 1, of the constitution was evidently for the purpose of establishing the right of the state to the beds of all navigable waters in the state, whether lakes or rivers, or fresh or salt, to the same extent the crown had in England in the sea, and in the arms and inlets thereof, and in the tidal rivers, and to eliminate the distinctions existing under the rule of the common law in this respect. Whatever rights the respondent possesses were acquired and became vested before the adoption of our state constitution. This court has decided that these rights are to be determined by the rule of the common law, so far as not repugnant to or inconsistent with the constitution and laws of the United States, or the organic act or laws of Washington Territory, or incompatible with the institutions and conditions of society in this state, and that the riparian owner is to be protected in the use and enjoyment of the water naturally flowing by or over his land, and, for the purpose of protecting the rights of a grantee of the government,—such as Russell V. Peabody and his grantees are in this case,—his title relates back to the first act necessary on his part in the proceedings to acquire title. *Benton v. Johncox*, 17 Wash. 277 (49 Pac. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912). Section 16, art. 1, of the constitution expressly provides, that “No private property shall be taken or damaged for *public* or private use without just compen-

sation having been first made, or paid into court for the owner." Section 1 of art. 17 of the constitution, under which the appellant claims that the state is the sole and absolute owner of the bed, the shore to high water mark, and the waters of Lake Whatcom, and can dispose of such waters as it sees fit, expressly protects all persons in asserting their claims to vested rights. That section reads as follows:

"The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: *Provided*, That this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state."

Though this section has the effect, as has been held by this court in *Eisenbach v. Hatfield*, 2 Wash. 236 (26 Pac. 539, 12 L. R. A. 632), and *Harbor Line Commissioners v. State*, 2 Wash. 530 (27 Pac. 550), of vesting in the state the entire and exclusive ownership of the beds and shores of all navigable waters, it should not be construed as affecting the rights of riparian proprietors upon non-navigable water courses, though their source is in navigable waters. The use of the water in such non-navigable streams is not inconsistent with the retention of the fee in the bed of navigable waters in the state. *Cocheco Co. v. Strafford*, 51 N. H. 455. The provisions of § 16, art. 1, of the constitution protect private property from confiscation for a *public* use; and the proviso to art. 17, § 1, clearly indicates that so far as rights had become vested, notwithstanding the other provisions of the section, the owner thereof should have the right to assert them in the courts; and, if this language means anything, it is that those rights should be protected and safeguarded by the courts.

In *Crook v. Hewitt*, 4 Wash. 749 (31 Pac. 28), this court quotes with approval from Gould on Waters (2d ed.), p. 396:

"The right to the use of the water in its natural flow is not a mere easement or appurtenance, but is inseparably annexed to the soil itself."

In *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576 (38 Pac. 147, 26 L. R. A. 425), it is said:

"The right to the use of water flowing over land is identified with the realty, and is a real and corporeal hereditament. . . . And this right is a substantial one, and may be the subject of sale or lease like the land itself."

In the two cases cited it is held that every riparian proprietor, in the absence of a grant, license, or prescription limiting his right, is entitled to have the stream which passes over or adjacent to his land flow as it is wont by nature, affected only in quantity or quality by the consequence of a reasonable use thereof by other proprietors, and that the riparian proprietor's right to the flow of the water is inseparably annexed to the soil, and passes with it, as a part and parcel of it. That a riparian proprietor may divert the water from the stream as it passes through his own land, without license from the proprietors above him, if he does not obstruct the water from flowing as freely as it was wont, and without license from the lower proprietors, if he restores the water to its natural channel before it enters their land and does not materially diminish its flow. The constitutional provision relied upon by the appellant does not in any way affect the rights of the respondent in the flowage of Whatcom creek as they existed in 1889, before the adoption of the constitution, when this action was instituted. The mere fact that the state owns the bed of Lake Whatcom has little, if any, bearing on the

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diversion of the waters so that they cease to flow in Whatcom creek; for, as we have said, the flow of the water in the creek is not inconsistent with the retention by the state of the fee in the bed of the lake. The right of the state over the waters of Lake Whatcom is such as pertains to sovereignty alone. That is the right to use, regulate, and control these waters as a common highway for commerce, trade, and intercourse, and to grant the soil in the bed of the lake so that it might become private property, subject to the paramount right of public use for navigation. In short, that the rights of the state in the navigable waters thereof are the same rights as pertained to the sovereign at common law in the sea, its bays, arms, and inlets. But conceding that by art. 17, § 1, of the constitution absolute ownership is now in the state, so that the state can dispose of the waters as well as the soil, the vested rights of the respondent, notwithstanding, are preserved to it. That is the right to the use of the water in its natural flow as it existed before the adoption of the constitution, when the United States granted to Russell V. Peabody, under the "Donation Act," the land over which Whatcom creek flows, of which the lands of the respondent are a part. The constitution having reserved to the respondent its vested rights, the legislature, except under the power of eminent domain, upon making compensation, could not divest it of that right, either directly or indirectly, for a *public* or private use. *Yates v. Milwaukee*, 10 Wall. 497. As was said by Justice MILLER in the case last cited:

"This riparian right is property and is valuable and though it must be enjoyed in due subjection to the rights of the public it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which once vested, the owners can only be deprived in accordance with estab-

lished law, and if necessary that it be taken for the public good upon due compensation."

As was said by the Missouri court of appeals in *Meyers v. St. Louis*, 8 Mo. App. 266:

"When it is settled that riparian rights are property,—and of this there seems to be no doubt,—the question as to the right to take them without compensation is at an end."

In *Mohr v. Gault*, 10 Wis. 513 (78 Am. Dec. 687),—a case where one undertook to cut a new channel so as to carry off the waters of a small lake by another way than through the usual outlet, on which the complainant's mill was situated,—it was held that the owners along the natural outlet had a legal right to the natural and usual flow of the water of the lake through such outlet.

The legislature of the state of New York had given a grant to the city of Rochester, authorizing it to enter upon, control and use the waters of Hemlock and Canadice lakes for the purpose of procuring a water supply for said city. These were large, fresh-water, navigable lakes, connected by a small stream; and Honeoye creek was their outlet, upon which was located Smith's water mills. Under legislative authority the city of Rochester proceeded to extract and carry away a part of the waters of these lakes, to the detriment of Smith. The city was enjoined, and the court of appeals held that the right to the usufructuary enjoyment of the undiminished and undisturbed flow which a riparian owner possesses in the case of non-navigable streams applies to fresh-water, navigable lakes, save that the public has an easement in such waters for the purposes of travel, as on a public highway, which easement, as it pertains to the sovereignty of the state, is inalienable and gives to the state the right to use, regulate, and control the waters for the purposes of navigation; and the right to

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divert the waters for other purposes than navigation, although public in their nature, can only be acquired under and by virtue of the sovereign right of eminent domain, and upon making just compensation. *Smith v. Rochester*, 92 N. Y. 463 (44 Am. Rep. 393). Two lakes were the reservoirs from which a creek was fed. One sought to appropriate the waters of the lakes in such a manner as the quantity of the water flowing down the creek would be interfered with. Plaintiffs were riparian owners and appropriators of the creek. The supreme court of California says:

"If the tapping of these lakes by appellants reduces the amount of water to which plaintiffs are entitled, or shortens the period of time in which they might otherwise secure water from the creek, then the acts of appellants clearly are a trespass upon plaintiffs' rights,—exactly the same kind of trespass as though the creek was tapped, and that amount of water directly taken therefrom, without any molestation of the lakes." *Baxter v. Gilbert*, 125 Cal. 580 (58 Pac. 128).

Plaintiff was the owner of certain mills built on his own land, on the banks of the Cottonwood river. The mills were propelled by water power obtained by means of a dam across the river. The city of Emporia constructed a system of water works for the purpose of supplying the citizens with water for domestic use, for extinguishing fires, and for manufacturing purposes. It purchased a tract of land on the banks of the pond above the plaintiff's dam, dug a well twenty-five feet in diameter and twenty-six feet in depth on its own land, and from seventy to a hundred feet from the bank of the pond. This well drew its supply of water from the pond by percolation through a bed of gravel at the bottom of the well. The city sank one pipe into the well and another it extended directly into the pond; the latter to be used in case of fire. By means of en-

gines and pumps it supplied the citizens from the well with water needed for ordinary purposes. The supply of water in the river at certain seasons of the year was inadequate for running the mills, and the plaintiff was forced to suspend work and allow his mills to stand idle. Justice BREWER in delivering the opinion of the supreme court of Kansas on this state of facts, said:

“The amount of water now used by the city and its present effect upon the plaintiff’s business do not determine the question of right or remedy. The continuance of the water works, as well as the growth of the city, will increase the demand; and, if the present abstraction can be sustained, there is no legal principle upon which the future and larger abstraction can be restrained. Now, that the flow of water in the natural channel of a surface stream is a property right of the riparian owner, is unquestioned and familiar law. (*Shamleffer v. Mill Co.*, 18 Kas. 24). If an individual should, by digging a new channel a few hundred feet above Soden’s dam, attempt to divert the flow of the stream, beyond doubt he would be restrained. And this restraint would be granted, not because of the mere fact of digging a channel, but because thereby the natural flow of the stream was prevented; not because of the manner, but because of the fact of the diversion. The restraint would be granted as readily if the abstraction was by pipes and pumps, as if by channel and a change of current. The principle is this: That whatever of benefit, whether of power or otherwise, comes from the flow of water in the channel of a natural stream, is a matter of property and belongs to the riparian owner, and is protected in law just as fully as the land which he owns. It cannot be taken for private use except by his consent, and for public use only upon due compensation.

“With these general and conceded principles, let us now inquire as to the validity of the grounds upon which the action of the city is sought to be justified. The fact is obvious, that by means of the pipe running into the pond, there will be in case of fire a direct abstraction of water, and the fact is found that by means of the well there is

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an indirect abstraction. The flow of water is, as heretofore stated, thus interfered with and the power diminished. It is in evidence that while at certain seasons of the year the water supply is more than enough for all of plaintiff's present uses, and that during such seasons the consumption of water in the city would work no present injury, yet at other seasons the supply is insufficient, and some, or all, of his mills are compelled to stop running. Hence, naturally, any subtraction of the water would tend to increase the time during which his mills must be idle, and therefore work present and positive injury—an injury increasing with the increasing consumption by the city. Further, if plaintiff is entitled to this water power at all, he is entitled to all of it, and may increase the number of mills, or amount of machinery propelled by it, until his uses shall wholly exhaust it. So that matters of amount really fade out of sight, and the question is one of right and title." *Emporia v. Soden*, 25 Kan. 588 (37 Am. Rep. 265).

In the same case the city sought to justify the taking of the water as a riparian owner owning the lands above the plaintiffs. On this point Justice BREWER says:

"While the undiminished flow of the stream is conceded to be the right of every riparian owner, yet this right has always been limited to this extent, that each riparian owner may, without subjecting himself to liability to any lower riparian owner, use of the water whatever is needed for his own domestic purposes and the watering of his stock. The city is a riparian owner, and, whether it uses little or much, it is simply taking for domestic purposes. Each individual citizen of Emporia may buy land on the banks of the river and then take for domestic uses whatever amount of water he needs. What the individual separately may do, the city, representing all the individuals, has done. Does the manner in which the result was accomplished make any difference in the right?

This argument is plausible, but not sound. A city cannot be considered a riparian owner within the scope of the exception named. The amount of water which an individ-

ual living on the banks of a stream will use for domestic purposes, is comparatively trifling. Such use may be tolerated upon the principle *de minimis non curat lex*. It is a use which must always be anticipated, and may reasonably be considered as one of the benefits of the ownership of the banks of a natural stream. Every one proposing to utilize the power of running water should reasonably expect that the stream is chargeable with such a slight burden. It is only a fair equalization of rights. But the taking of water for the supply of a populous and growing city, stands upon an entirely different basis. No man can foresee this; and if it were tolerated, no one would dare to expend money in utilizing this power for fear of its being soon taken from him without compensation, and with total loss to his investment. The city, as a corporation, may own land on the banks, and thus in one sense be a riparian owner. But this does not make each citizen a riparian owner. And the corporation is not taking the water for its own domestic purposes; it is not an individual; it has no natural wants; it is not taking for its own use, but to supply a multitude of individuals; it takes to sell. Again, the statute under which the city is acting (Comp. Laws 1879, p. 997, § 1) authorizes the taking of water 'for the purpose of supplying the inhabitants of such cities with water for domestic use, the extinguishment of fires, and for manufacturing and other purposes.' It would be strange if the city could destroy plaintiff's water power without compensation, and then sell it to other manufacturers, and thus build up rival establishments." *Emporia v. Soden, supra*.

See, also, *Stein v. Burden*, 24 Ala. 130 (60 Am. Dec. 453); *Garwood v. New York C. & H. R. R. Co.*, 83 N. Y. 400 (38 Am. Rep. 452).

It is not disputed in this case that the effect of the appellant's intake pipes, as laid into the lake, is simply to afford an additional channel for the outflow of the lake, and that respondent's mill is deprived of the amount of water by the city actually diverted. Now, no one can do indi-

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rectly what the law will not permit him to do directly. On this point, in the case of *Emporia v. Soden*, *supra*, the court says:

"It is also a general proposition, that a man may not do indirectly what he may not do directly. Unquestionably, a party may not run pipes into plaintiff's mill-pond, or dig a channel to it and thus divert the water. May he accomplish the same result by digging a well upon the very banks, and so near thereto that the water oozes out from the pond into the well, and be beyond the reach of the law so long as he keeps a wall of earth between the well and the pond? If this were recognized as law, protection to the owners of water power would rest on slender foundations. Often the banks of a stream are composed of very porous soil; or it may be there is, as in this case, a bed of gravel through which the water runs as through a sieve. Is the owner of the pond, then, at the mercy of any one who, avoiding the more direct and public method of pipe or channel, resorts to the equally effective means of adjacent wells? And if a well on the very bank would be restrained, may the same result be accomplished by digging one a few feet off? It would seem as though but one answer could in justice be given—that the owner of an established power is entitled to protection against any subtraction therefrom, whether sought to be accomplished by direct or indirect methods."

The intake pipes of the appellant, twenty-four inches in diameter, placed six feet below the bed of Whatcom creek, a quarter of a mile from the outlet of the lake, through which the appellant diverts the water that would otherwise flow down the bed of the creek, certainly cause an indirect diversion of the water from the bed of the creek to the extent of the capacity of the pipe; and this diversion is just as much a violation of the rights of the respondent as if the pipe was in the bed of the creek above the respondent's mill, where it was originally placed by the water company. The *Great Pond Cases* from Massachusetts and

Maine have no bearing upon this case; for, as the appellant says, the colonial ordinances of Massachusetts changed the common law as to great ponds in both those states. The cases from New York cited by appellant, on the Mohawk and Hudson rivers, grew out of the civil law prevailing in the Netherlands, under which titles were granted to the original settlers. *Smith v. Rochester*, 92 N. Y. 482 (44 Am. Rep. 393). The only case that the appellant has cited bearing upon the question here involved, and contrary to the authorities we have cited, and the views we have expressed, is from Minnesota,—the case of *Minneapolis Mill Co. v. Board of Water Commissioners*, 56 Minn. 485 (58 N. W. 33). In that case the appellants were a corporation created by acts of the territorial legislature and authorized to build and maintain dams in the Mississippi river, at the falls of St. Anthony, for the development of water power and for the use and sale of such power. Dams were erected and maintained under this authority forming such power. After this the legislature authorized the city of St. Paul to purchase, and there was purchased, the property and franchises of a private corporation theretofore engaged in supplying said city with water. Under the provisions of law the city extended this system and established a pumping station at Lake Baldwin, a body of water with an area less than a mile square, and by means of its pumps forced water through conduits to the city for public use. The outlet of this lake is Rice creek, and this creek empties into the Mississippi river a few miles above the dams built and maintained by appellants. The claim was that the result of this diversion was to greatly diminish the volume which came to the dam, and to materially affect and reduce the water power. The supreme court of Minnesota, in rendering their opinion, say:

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"The plaintiffs are riparian owners on a navigable or public stream, and their rights as such owners are subordinate to public uses of the water in the stream, and their rights under their charters are equally with their rights as riparian owners, subordinate to these public uses.

"There can be no doubt but that the public, through their representatives, have the right to apply these waters to such public uses without providing for making compensation to riparian owners.

"The navigation of the stream is not the only public use to which these public waters may be thus applied. The right to draw from them a supply of water for the ordinary use of cities in their vicinity is such a public use, and has always been so recognized. At the present time it is one of the most important public rights and is daily growing in importance as population increases. . . .

"In thus taking water from navigable streams or lakes for such ordinary public uses, the power of the state is not limited or controlled by the rules which obtain between riparian owners as to the diversion from, and its return to, its natural channels. Once conceding that the taking is for a public use, and the above proposition naturally follows."

Not an authority is cited by that court to sustain these views. This case was appealed to the supreme court of the United States. That court held that the property rights of the plaintiff in error as riparian owners were to be measured by the rules and decisions of the state courts of Minnesota, and that none of the decisions of the state courts of Minnesota were inconsistent with the decision of the court in the case under review, and for that reason the supreme court of the United States affirmed the judgment. *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U. S. 349 (18 Sup. Ct. 157).

That case has little, if any, bearing on the one under consideration; for the supreme court of this state, in cases

heretofore cited, has repeatedly held the rule to be otherwise than that laid down by the supreme court of Minnesota. It may be conceded that at the time this action was tried and judgment was entered, the city of New Whatcom, under the law approved March 14, 1899 (Session Laws, p. 250), authorizing municipal ownership of certain public utilities, had the right to take and appropriate from Lake Whatcom an ample supply of water for all uses and purposes, public and private, and that it had the right to build dams or other works across the outlet of any lake or water course for the purpose of storing and retaining water therein up to and above high water mark; provided, that such dam did not obstruct, impede, or interfere with navigation or other public uses; and provided further, that, if any private property should be necessary for such purposes, the same was to be condemned or purchased. In this case, however, no steps have been taken to condemn or purchase the property of the respondent in the flow of Whatcom creek, which the appellant has appropriated, and this is one of the very things the city was required to do when exercising the powers conferred on it by the act of 1899. Mr. Loggie, a lessee of the respondent's mill, with the permission of the appellant, but without permission or direction from the respondent, in 1899 (the year of the trial of this case), built a temporary dam at the outlet of the lake for the purpose of storing the water for use during the dry season. There is testimony tending to show that by means of this dam a sufficient quantity of water was stored in the lake for the use of the appellant, and also the respondent's mill, during the dry season of that year. We are at a loss to know why this fact is urged against the correctness of the trial court's decree. The city of New Whatcom is a large and growing city, and it may need, under its water system, all

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of the outflow waters of Lake Whatcom both summer and winter.

The question involved in this action is the right of the city to divert a part or all of these waters without compensating the respondent, the owner of this outflow at the mouth of the natural outlet. We hold that the judgment and decree of the court below was correct, and is fully sustained by reason and the decisions of this and almost all other courts, and for that reason the judgment must be affirmed subject to the modifications hereinafter indicated.

While it is no part of the office of the court to consider the ways and means by which the appellant may comply with the decree entered against it, yet, in this case, as a numerous population will be suddenly deprived of that which is essential to their health and existence if the decree is at once enforced, we modify the decree of the court below as follows: The said appellant shall have sixty days from the filing of this opinion to purchase from or otherwise arrange with the respondent for the use of said flowage, or, if such purchase or arrangement cannot be made, to commence proceedings in the superior court to condemn the property and rights of the respondent in Whatcom creek as indicated in this opinion. If condemnation proceedings are instituted within said time, then the injunction granted by the decree of the court below shall be stayed until the final determination of such condemnation proceedings; provided, such proceedings are prosecuted by the appellant with due diligence. The respondent to recover its costs in the court below and on this appeal.

FULLERTON and ANDERS, JJ., concur.

REAVIS, C. J., concurs on the ground that respondent made the first appropriation and use for a beneficial purpose.

DUNBAR, J. I concur in the affirmance of the judgment but not in what is said in relation to the modification. The appellant can pursue its legal remedies, if it has any, like any other litigant, and the respondent is as much entitled to its legal remedy, unqualified by prescribed conditions, as though its adversary were an individual.

[No. 3703. Decided April 8, 1901.]

THE STATE OF WASHINGTON, *Respondent*, v. EBEN L.
BOYCE, *Appellant*.

CRIMINAL LAW — PREMATURE ARRAIGNMENT AND PLEA — HARMLESS
ERROR.

Error of the court, if any, in arraigning defendant in a criminal prosecution and compelling him to enter his plea before procuring counsel is cured by the subsequent action of the court, after the appointment of counsel, in allowing the plea to be withdrawn and the validity of the information to be attacked by demurrer and motion to quash.

SAME — PROSECUTION BY INFORMATION.

While certain facts must exist in order to warrant prosecution by information, it is not necessary that the existence of such facts should appear upon the face of the information.

SAME — CONTINUANCE — DISCRETION OF COURT.

The refusal of the court to grant a continuance in a criminal prosecution does not show an abuse of the discretion vested in it, when it appears that several of the witnesses, including those absolutely necessary to the defense, for whom the continuance was asked, were present at the trial, and that other witnesses were obtained from localities where the witnesses lived who were mentioned in the affidavit for continuance, and who testified substantially to all that it was claimed in the affidavit the witnesses desired would testify to.

JUROR — VOIR DIRE — RIGHT OF COURT TO PUT LEADING QUESTIONS.

The fact that the court, for the purpose of passing upon the qualifications of a juror who has been challenged, asks him the leading question, "Would you not obey the instruction of the court as to the law in the case?" would not constitute error.

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25	423
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27	76
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36	447

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Syllabus.

SAME — COMPETENCY — BIAS.

A juror is not chargeable with bias or implied bias when he states on his examination that he would require no greater evidence to convict a man of murder in the first degree where the penalty is death than he would where the penalty is imprisonment in the penitentiary.

SAME — IMPRESSIONS ACQUIRED BY READING NEWSPAPER.

In a prosecution for murder, when the fact of killing was not denied, but the defense was based on drunkenness and insanity, a juror was not shown to be disqualified from the fact that he had read a newspaper account of the killing, but did not know who was charged; that he had no opinion as to the guilt or innocence of the accused; that what he read was a mere matter of news and he did not know whether the newspaper account was true or not, but he believed from the account the person whose name was given in the paper was the person who killed deceased, and that it would take considerable evidence to change his mind.

SAME — RELATIONSHIP BETWEEN ATTORNEY AND JUROR.

The fact that the attorney for the prosecution trades with a juror, and that the latter has a high opinion of him as a man, and would go to him if he should become involved in litigation, but has never consulted him as an attorney, is not a disqualification of the juror, under Bal. Code, § 4984, which provides that a challenge for implied bias may be taken when it appears that the juror and the attorney are standing in the relation of attorney and client.

WITNESSES — EXPERTS — COMPETENCY.

The action of the court in overruling an objection to the competency of a witness as an expert upon questions of insanity is not error, when the record shows that, although the witness stated he did not like the word "expert" and did not call himself an expert, yet he was a practicing physician; that he had examined people a great many times and even deprived them of their liberty in an asylum by his knowledge of insanity, though not assuming to be a specialist on that subject.

SAME — COMMENTS BY COURT ON QUALIFICATIONS.

Comments by the court upon the qualifications and competency of a witness offered as an expert do not constitute error, when the comments were made in answer to objections by the attorneys, in passing upon the qualifications of the witness.

SAME — HYPOTHETICAL QUESTIONS — HARMLESS ERROR.

Where objection was made that a question propounded to a

witness was not a hypothetical question, because not based upon the evidence in the case, the ruling by the court that it was a question for the jury and not the court to decide, if error, was without prejudice, when it plainly appeared from the record that the question was founded upon the testimony.

HOMICIDE — MURDER IN FIRST DEGREE — WHEN QUESTION FOR JURY.

Where the testimony of eye witnesses to a homicide tends to show malice, premeditation and deliberation on the part of the accused, it is proper for the court to refuse to take from the consideration of the jury the question of murder in the first degree.

ARGUMENT OF COUNSEL — REFERENCE TO MATTERS NOT IN EVIDENCE — WHEN PROPER.

It is not improper for the attorney for the state, in his closing argument to the jury, to advert to matters that the defendant's attorney in his opening statement claimed they would prove, and call attention to the fact that no evidence had been introduced upon those points.

SAME — INSTRUCTING JURY AGAINST IMPROPER ARGUMENT.

Where the court informs the jury that the remarks of counsel are not proper, it is equivalent to an order withdrawing the remarks from their consideration, and no error can be based upon the improper argument.

BAILIFFS — IN CHARGE OF JURY — RECITALS OF RECORD.

Where the record shows that the jury retired in charge of a sworn bailiff, it is a sufficient showing that the bailiff was sworn to take charge of the jury in accordance with the statute.

SAME — MISCONDUCT — REMOVING JURY FROM ONE ROOM TO ANOTHER.

The taking a jury from one part of a court house to a more comfortable room in the same building, after they had agreed on their verdict, but before it was received, does not constitute such a separation of the jury as to be misconduct on the part of the bailiff.

Appeal from Superior Court, Pierce County.—Hon. W. H. H. KEAN, Judge. Affirmed.

James F. O'Brien and *G. W. H. Davis*, for appellant.

Fremont Campbell, Prosecuting Attorney, and *Charles O. Bates*, for the State.

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The opinion of the court was delivered by

DUNBAR, J.—The information filed in this case charged appellant with murder in the first degree. Upon the trial he was convicted of murder in the first degree, and judgment was pronounced in accordance with the verdict. From such judgment this appeal is taken.

The first assignment of error is that the court erred in arraigning appellant and compelling him to enter his plea before he could procure counsel, and without appointing counsel for him. The record shows that the accused was arraigned and caused to plead before counsel were appointed for him. The accused killed his wife by shooting her several times with a revolver in a restaurant in the city of Tacoma. The shooting occurred February 10, 1900. The accused was arrested, arraigned, and pleaded, on Tuesday, February 13th, without counsel. There is no substance in the assignment of error, however, for after counsel were appointed on February 20th, they were allowed to withdraw the plea of not guilty, and a demurrer was interposed to the information, and motion to quash the information was also filed on the 21st of February; so that the error, if any, arising from the action of the court in causing defendant to plead before counsel were appointed, was remedied by the subsequent action of the court in allowing the plea to be withdrawn.

The second assignment is that the court erred in overruling the appellant's demurrer to the information. Outside of the fact that the record does not contain the demurrer, and no exception appears to the order of the court overruling the demurrer, we have examined the information, and think it is unassailable.

The third assignment is that the court erred in denying appellant's motion to quash the information, for the reason that neither the information nor record shows the neces-

sary facts to exist in order to prosecute by information. It may be stated that the record shows that this motion was not properly made, and not made at the proper time, it having been made after the overruling of the demurrer; yet, on the merits of the motion, in answer to the objection that the information does not show the necessary facts to exist in order to prosecute by information, viz., that there was no grand jury in session, and that the defendant had not been committed by a magistrate, it has been frequently held by this court that it was not necessary that the information should allege the existence of the facts authorizing the filing of the information. In *State v. Anderson*, 5 Wash. 350 (31 Pac. 969), it was said:

“The ground upon which the information is attacked is that it does not affirmatively appear upon the face thereof that there was no grand jury in session, nor that the defendant had been committed by a magistrate on said charge. Neither of these objections can avail appellant. It is true that certain facts must exist before the prosecuting attorney gets jurisdiction of the case in such a manner as to be authorized to file an information against the defendant, but the statute nowhere makes it necessary that the existence or non-existence of such facts should be made to appear upon the face of the information.”

And such has been the uniform ruling of this court ever since.

The fifth assignment is that the court erred in denying appellant's motion for a continuance. Very strong affidavits were made by the attorneys for the defense in support of their motion for a continuance in this case. This motion was overruled by the lower court, and it is earnestly contended that there was an abuse of discretion of the court in denying the motion. We have examined with care the affidavits on file, but when taken in connection with the whole record, it appearing that several of the witnesses, whom it is alleged in the affidavit the defendant

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would not be able to obtain at the trial were present and testified at the trial, and especially the father of the defendant, who, it was alleged, was absolutely necessary to the defense, and the additional fact that several other witnesses were obtained from the places where the witnesses lived who were mentioned in the affidavit, and who testified substantially to all that it was claimed in the affidavit the witnesses desired would testify to, we are not able to say that the court abused the discretion which is so largely vested in it by the law, or that the defendant was in any way prejudiced by the overruling of the motion. Neither does it appear from the record that any exception was taken to the ruling of the court in setting the case down for trial on March 19th. The murder was committed on the 10th of February. The arraignment and first plea were on the 13th. The appointment of the counsel to defend was on the 20th. On the 21st the plea was withdrawn, the motion and demurrer filed and overruled, and the cause set for February 27th. On the 24th day of February, counsel filed an affidavit for continuance over the term, it being just at the close of the jury term. The court, however, continued the case to March 19th.

The next contention is that the court erred in denying appellant's challenge for cause to juror J. J. Lemon. In answer to the question by Mr. Davis: "Would you require any greater evidence to convict a man for murder in the first degree where the penalty is death than you would to convict him where the penalty is imprisonment in the penitentiary?" the juror answered: "No, sir;" whereupon the juror was challenged for bias and implied bias. The court remarked, "I know of only one rule, and that is, beyond a reasonable doubt;" asking the following question of the juror: "You would obey the instruction of the court as to the law in the case, wouldn't

you, Mr. Lemon?" Answer. "Most assuredly." The court: "I see nothing in the juror that is unfair or biased so far." Mr. Davis: "We desire an exception to the ruling of the court." We think the court properly stated the rule. The juror must be convinced beyond a reasonable doubt of the guilt of the accused. The man who is on trial for a capital offense is entitled to this. He who is on trial for a lesser crime is no less entitled. Neither are we able to see in what manner the remarks of the court could have prejudiced the defendant. The court has a right to ask jurors leading questions, because it is the duty of the court to pass upon the qualification of the juror. We therefore think no error was committed in this respect. The same may be said of the further objection to the court's questions to the juror in relation to the juror's prejudice against the drinking of liquor.

The denying of the appellant's challenge to juror Oleson is the sixth assignment of error. The examination of this juror is too long to reproduce in this opinion, but in answer to the question, "Did the account you read in the News at the time tend to fix an impression in your mind as to the guilt or innocence of the defendant?" the answer was, "No, sir." Question: "Have you talked with any—" "Have you ever expressed an opinion as to the merits of body about the case?" Answer: "No, sir." Question: "the case?" Answer: "No, sir." Question: "Have you any opinion?" "No, sir." This was the first testimony of the juror in answer to plain questions, and it will be noted that he stated that the account that he read had not tended to fix either an opinion or an impression upon his mind, and that he had no opinion at the time of the examination. Further on, under the examination of Mr. Davis, counsel for defense, after the witness had stated that he had never heard any one speak anything about this case, the following occurred:

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"Question. You read an account of it, did you?

Answer. Yes, sir; I read it in the paper; in the News or Ledger.

Q. Well, at the time you read the account did you have any impression as to whether or not a woman had been killed?

A. No, sir.

Q. Did you have any impression as to who did it?

A. No, sir; it was simply a man's name in the paper.

Q. You thought that he was the one that did it?

A. That is what I thought.

Q. You thought that some one had killed a woman down here on Tenth street?

A. Yes, sir.

Q. Now, you believed from that the defendant, whose name was in the papers, was the man that did it, didn't you?

A. Yes, sir.

Q. And there has been nothing come up to change your mind since then, has there?

A. No, sir.

Q. You are still of that opinion, are you?

A. Yes, sir.

Q. Now, that opinion is still formed in your mind, is it not?

A. Yes, sir.

Q. And it would take considerable evidence to change your mind, would it not?

A. Yes, sir.

Q. You believe, do you, that the defendant should prove to this court and jury that he is not guilty of that charge?

A. No, sir.

Q. What is your opinion in regard to that?

The Court: You need not answer that.

Objection. Whereupon the juror was challenged."

In addition to the fact that the further examination elicited the statement that the juror did not know who it was that was charged with killing the woman, and did not know whether the newspaper account was true or not;

that, notwithstanding what he had read, he had no opinion as to the guilt or innocence of the defendant, and that what he had read was a mere matter of news,—the testimony elicited by the attorney for the defense is not in any way calculated to show any bias or prejudice on the part of the juror. The substance of the whole examination was that he had read in a newspaper that a woman was killed, and believed from the reading of the account that the person whose name was in the paper was the person who killed her, not knowing whether the account was true or not. If this witness were to be disqualified, every man in the state who reads newspapers would be disqualified. In addition to this, the killing of this woman by the defendant was not denied, excepting so far as it is denied by the plea of not guilty. It was proven beyond a question, even by the defense, and the practical defense was the irresponsibility of the defendant by reason of drunkenness and insanity. So that under no circumstances could the defendant have been prejudiced by the refusal of the court to sustain the challenge to this juror. Nor do we think that the examination brings the juror within the rule laid down by this court in *State v. Moody*, 18 Wash. 165 (51 Pac. 356); *State v. Murphy*, 9 Wash. 204 (37 Pac. 420); *State v. Wilcox*, 11 Wash. 215 (39 Pac. 368); *State v. Rutten*, 13 Wash. 203 (43 Pac. 30), and *State v. Crotts*, 22 Wash. 245 (60 Pac. 403).

There is another contention, viz., that this juror was disqualified by reason of his relations with the deputy prosecuting attorney, Mr. Bates. The examination in that regard is as follows:

“Q. (By Mr. Davis, after some preliminary questions.) Are you acquainted with either of the attorneys representing the state?

A. Yes, sir.

Q. Are you acquainted with Mr. Bates?

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A. Yes, sir.

Q. Have you done any business with Mr. Bates?

A. Yes, sir.

Q. He is your attorney, is he?

A. No, sir.

Q. Buy groceries of ycu?

A. Yes, sir.

Q. How long have you been doing business with Mr. Bates?

A. More or less for the last five years.

Q. And right up to the present time?

A. Yes, sir.

Q. You consider him one of your customers in your business?

A. Yes, sir."

And further on, after an examination on the merits of the case:

"Q. Mr. Oleson, you are on friendly terms with Mr. Bates, are you not?

A. No, sir—that is, Mr. Bates come in the store and buy the groceries, and I know Mr. Bates by that, and he do the business and pay his bills like a gentleman; that is all I know.

Q. You are on friendly terms with him, are you not?

A. I talk with him only on business, and so on.

Q. Has he been your attorney in any case?

A. No, sir.

Q. In case you had litigation of any importance would you consult him in regard to it?

A. Yes, sir, I would; but I have never had any litigation in court.

Q. Then your regard for him is such that if you did have a case that you would consult him in regard to it?

A. Yes, sir.

Q. And retain him as your attorney?

A. Yes, sir."

(Here a challenge was interposed.)

"Q. (By the Court) Is Mr. Bates now your attorney?

A. No, sir.

Q. Has he ever been?

A. No, sir.

Q. You haven't any litigation in view, have you?

A. No, sir.

Q. You haven't any matters that you contemplate submitting to a counsel?

A. No, sir."

(Challenge denied.)

"Q. (By Mr. Davis) Now, in considering this case, Mr. Oleson, as a juror, you would consider the opinion of Mr. Bates and his judgment and argument of this case as about correct, wouldn't you?

A. No, sir.

Q. You wouldn't be governed then so much by his opinion and his argument in this case as you would by some other attorney?

A. Of course, I will do that what is the same way—the same as any attorney. I don't give an opinion before I hear the case from both sides, and what the tale is and what my opinion is about it. I don't care which attorney comes up and talks—of course, I can't say that now."

There seems to us to be no real merit in this contention. Sec. 4984, Bal. Code, provides that a challenge for implied bias may be taken when it appears that the juror and the attorney are standing in the relation of guardian and ward or attorney and client, etc. But it certainly cannot be the law that a juror is disqualified because he happens to have a good opinion of an attorney, either with reference to his ability as a lawyer or his reputation for paying his debts promptly. If this standard were adopted, it would be almost impossible to obtain an unbiased jury in a community where a lawyer with a good reputation for legal ability and business integrity was engaged in the trial of the cause.

The ninth assignment is that the court erred in overruling appellant's objections to the qualifications and competency of witness Dr. T. F. Smith to qualify as an

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expert; the tenth, that the court erred in commenting upon the qualifications and competency of the witness Smith; the eleventh, that the court erred in propounding leading, suggestive, improper and prejudicial questions to the witness Smith relative to his competency to testify as an expert; and the twelfth, that the court erred in commenting upon the testimony and qualifications of the witness Smith relative to his competency to testify as an expert. We do not think that the testimony of Dr. Smith, as a whole, shows that he was not competent to testify as an expert. The doctor said that he did not like the word "expert;" did not like to call himself an expert; but he did say that he considered himself enough an expert on insanity so that he examined people, even deprived them of their liberty in an asylum by his knowledge of insanity, and that he had done it a great many times, but that he was not a specialist on insanity; and his whole testimony showed that he drew a distinction between an expert and a specialist. While in the first part of his testimony he would not say that he was an expert, saying that he did not like the word "expert," he did say that he was competent to testify as an expert. Neither do we think that there was any prejudicial error committed by the court in commenting upon the qualifications and competency of the witness Dr. Smith. The comments were in answer to objections by the attorneys for the defense. The court, of necessity, passes upon the qualifications of the witnesses, and the remarks and answers that he made were natural and proper to the occasion.

It is also insisted that the court committed error in relation to a remark made concerning the hypothetical question which had been propounded by counsel for the state. The objection to the question was that it was not a hypothetical question, and was not based upon the evidence in

the case. The ruling of the court was as follows: "In my judgment it is always a question for the jury. If the question is not based on the evidence the jury can exclude it and should exclude it." It is contended by the appellant that the fact as to whether or not the question was hypothetical, and based upon the facts, was to be decided by the court before the witness answered the question. But even conceding, without deciding, that the court erred in the reasons it assigned for allowing the question, there was no prejudicial error committed, for the record plainly shows that the question was founded upon the testimony.

It is also contended that the court erred in overruling the appellant's motion to take from the consideration of the jury the question of the guilt or innocence of the appellant as far as murder in the first degree was concerned, upon the ground that the state had not shown by any competent testimony the facts necessary to exist in order to constitute murder in the first degree. We cannot agree with counsel for defense in this contention. If the testimony of eye-witnesses to the crime is to be believed,—and it was the province of the jury to pass upon its credibility,—it was ample to show malice, premeditation, and deliberation on the part of the defendant. We have examined the instructions given by the court in this case, and are not able to find any error in such instructions. They stated the law of the case and were full and fair, and no other instructions were necessary to protect the rights of the defendant.

Assignments fifteen and sixteen relate to alleged errors of the prosecuting attorney in his closing argument to the jury. In the closing argument the state's attorney made the following statement to the jury:

"Mr. Davis, the attorney for the defendant, said in his opening statement as to what they would prove, that the

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defendant met and married the deceased in a sporting house in San Francisco, California, but not one word of evidence has been produced.”

Attorneys for the defendant then objected to the statement of the state's attorney, and asked the court to instruct the jury that they should not consider the same, and to instruct the state's attorney against making such statements; but the court stated that such statements were legitimate argument, and refused to comply with the request of defendant's counsel. The state's attorney then proceeded and said: “They said in their opening statement that they would prove that the defendant drank beno-beno in the Philippines and that it made him crazy, but not one word has been given in evidence of that fact,”—to which defendant also excepted. The record shows that the attorney for defense had in his opening statement made the remarks attributed to him by the state's attorney in his closing argument, and we think with the court that the statements made by the state's attorney were legitimate argument. The assertion had been made by the defendant's attorney. If it had not been called to the attention of the jury in the closing argument that these assertions had not been substantiated by proof, the bare statement of the attorney might have left the impression in the minds of the jurors that proof to that effect had been made. It was certainly the right of the state's attorney to clear the minds of the jurors of any false impressions that may have been lodged there by reason of statements made by counsel in the opening statement, which had not been proven. Further in the argument the state's attorney said: “You have seen the defendant here in the court room from day to day. You can see that he is sane, and you know it.” And in the closing remarks he said: “It has been commonly known in this county that criminals were not

punished.” Whereupon attorneys for defendant objected to the statement and the court ruled that the statement was not proper. The state’s attorney then said: “It is too often the case that criminals go unpunished.” The court again cautioned the state’s attorney, when he, proceeding, said: “No matter what is done in other counties in the state, in Pierce county it shall not be said that criminals go unpunished.” No exceptions were taken to this last remark. We are inclined to think that the remarks of the state’s attorney did not contain any prejudicial error. Some latitude must be given to counsel in the heat of discussion, and, as has been often said, if every apparent indiscretion which a counsel is guilty of in his remarks to the jury were to be the subject of review, the appellate court would have no time to pass upon graver questions, but its time would be occupied in reviewing remarks of counsel. In addition to this, the jury was informed by the court that the remarks were not proper, which was equivalent to an order withdrawing the remarks from the consideration of the jury. The record convinces us that the court was justified in overruling the motion for a new trial, and that there was no misconduct of the jury that was prejudicial to defendant.

It is also claimed that the record does not show that the bailiff was sworn to take charge of the jury, as required in capital cases. But the record does show that the jury were placed in the custody of sworn bailiffs to deliberate upon their verdict, and the statement in the record that the jury retired in charge of a sworn bailiff is sufficient to show that the bailiff was sworn. *State v. Barkuloo*, 18 Wash. 141 (51 Pac. 350).

Neither do we think there is any merit in the contention that there was misconduct on the part of the bailiff in allowing the jury to separate, and taking them from

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one part of the court house to another, after they had agreed upon their verdict but before it was received. This was not such a separation as was discussed in *Anderson v. State*, 2 Wash. 183 (26 Pac. 267). The jury in this case did not actually separate from the commencement of the trial until after they had rendered their verdict, but were simply taken to more comfortable quarters in the same building.

Neither do we think there is anything in the motion for a new trial on the ground of newly discovered evidence.

The defendant had a fair trial, the law was properly administered by the court, his rights were guarded by the instructions, there was no error in the admission or rejection of testimony, the jury have found the facts against him, and he must abide by the verdict.

The judgment is affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3756. Decided April 8, 1901.]

CECILIA McCORD, *Respondent*, v. GEORGE McCORD,
Appellant.

JUDGMENTS — VACATION — RES JUDICATA.

One who has attacked a judgment by motion to vacate, and has failed to prosecute an appeal from the denial of his motion, cannot subsequently maintain an action to cancel the judgment, since his remedy was by appeal, and the question of the validity of the judgment is *res judicata*.

SAME — DISCRETION OF COURT.

Where the appellate court is not in possession of all the circumstances surrounding the case upon which the lower court acted in refusing to vacate a judgment, there is no ground for its interference with the action of the lower court, since the

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question of the vacation of a judgment is so largely a matter of discretion, that the orders of the lower court therein will not be reversed, unless it plainly appears that the discretion has been abused.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

J. J. McCafferty, John F. Dore and John W. Kelley,
for appellant.

Preston, Carr & Gilman, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The respondent commenced an action for divorce against the appellant by filing a complaint and summons, on the 8th day of November, 1899, in the superior court of King county. The sheriff returned that he was unable to find the defendant in King county. On proper showing an order was granted to have the defendant served with summons by publication, and the first publication was made on the 15th day of November, 1899. On the 16th day of January, 1900, notice was served on the prosecuting attorney of King county that the action would be called for trial on January 20th, as a default case. On January 20th the defendant was declared in default. The case was heard and decree for divorce was entered in favor of the respondent; also, certain property was adjudged to be the property of the respondent. The appellant at the time was in the Northwest Territory, and, according to his petition, did not receive a copy of the summons until the 20th day of January, 1900, the day upon which the decree was entered. He entered into communication with one M. M. Madigan, an attorney at law in Seattle, who appeared for the defendant, and on his behalf served on the plaintiff's attorney and filed in the action a motion to set aside the judg-

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ment rendered on the 20th day of January. On the 14th day of April another motion was made to set aside the judgment. On the 24th day of April the motion came on for hearing and was denied by the court. Attorney Madigan died some time after this, and the present attorneys were employed. A petition to re-open and to vacate and set aside the judgment was heard and denied on the 19th day of September, 1900, and, from the action of the court in denying this petition, this appeal is taken.

A very earnest appeal in behalf of the petition of the appellant is made by counsel in their brief, and it is insisted that he has never had his day in court, and that a fraud has been perpetrated upon him by reason of the proceedings. But we are inclined to think that appellant has lost his rights in this action, if he ever had any. His petition, in which presumably was set out all the defense to the action that he had, was determined against him by the court on April 24, 1900. The ruling of the court in this respect was appealable. It is said by this court in *Chezum v. Claypool*, 22 Wash. 498 (61 Pac. 157, 79 Am. St. Rep. 955) that where the statutes afford a full, complete, and adequate remedy against an illegal judgment, by authorizing the aggrieved party to proceed by motion to vacate and set aside, and permitting an appeal from any order entered upon such motion, one who has attacked a judgment by motion to vacate, and has failed to prosecute an appeal from the denial of his motion, cannot subsequently maintain an action to cancel the judgment, since the question of the validity of the judgment is *res judicata*. The action here is in effect the same as it was in that case. The remedy was by an appeal from the order rendered on the 24th day of April, 1900, instead of by another motion based upon practically the same application.

It is said that the attorney who represented the appellant in the first application died; but when he died, and whether he was prevented from perfecting an appeal by his illness and decease, or whether he saw fit to waive his rights to an appeal, does not appear of record. Again, the question of the vacation of a judgment is so largely a matter of discretion in the lower court that the appellate court would hesitate to reverse its judgment on that question unless it plainly appeared that the discretion had been abused. It was said by this court in *Livesley v. O'Brien*, 6 Wash. 553 (34 Pac. 134), in discussing a motion to vacate:

“Motions of this character are directed to the discretion of the trial court, and its action in passing thereon will not be reversed by this court unless the record shows an abuse of such discretion. It is not sufficient that we should find as a matter of fact that the showing was sufficient to have justified the setting aside of the judgment. We must further find that the showing was such that there was no room for the exercise of discretion by the lower court before we can rightfully interfere.”

The evidence adduced at the trial in this case has not been brought here. Consequently this court is not in possession of all the circumstances surrounding the case upon which the lower court acted. It is, however, urged by the attorneys for the appellant in their brief that the appellant, who had been in the Northwest Territory since April, 1895, returned to his home at Seattle in the fall of 1898, living with his wife until the spring of 1899, some four months, and that during such visit the wife treated him with respect and affection, and by reason of such treatment the appellant was deceived with reference to any intention which the wife had of bringing an action against him for divorce. In fact, this appears in the answer of the appellant, sworn to by himself, which

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was filed in connection with his petition on the 11th of September, 1900, in aid of his last application for a vacation of the judgment. The answer in this respect is as follows:

"And defendant further shows that about the month of April, 1899, after a visit to his wife and home in the winter of 1898 and 1899, defendant returned to Bonanza aforesaid in the Northwest Territory, and defendant left with the full knowledge, consent, and approval of the plaintiff, and the conduct of the plaintiff towards the defendant during his said visit home in the winter of 1898 and 1899, and at parting in April, 1899, was of a most affectionate and loving kind and character. Plaintiff, at parting, kissed and fondly and affectionately bid the defendant good-bye and God-speed, and sent her son to the station with the defendant; and there were no words spoken by the plaintiff and no act on the part of the plaintiff intimating, in the remotest degree, that the plaintiff was dissatisfied with the defendant from any point of view, or had anything except the kindest and most affectionate and loving feelings for him."

But in the answer which was filed a few months before in aid of his first petition for a vacation, we find the following in relation to the same visit:

"That from the time he returned from Dawson City to Seattle, in the fall of 1898, and until about March 1st, when he again returned to the Klondike, the plaintiff was guilty of cruel and inhuman treatment to and of the defendant, in this: that she would not allow him around his home during the day-time at all; that she kept up a continual course of nagging, teasing, and quarreling with and harassing defendant, accusing him of being jealous of her and in other ways, and using vile and abusive language to and of him, not fit to be mentioned herein, which nagging and abuse defendant now believes was for the sole purpose of exasperating the defendant so that she might get some excuse for a foundation for a divorce against him and cheat and defraud him out of all of his said property."

We mention these contradictory assertions simply to show that the court may have taken them into consideration, with other circumstances which may have come to the court's knowledge, in denying the last application presented to him. It is true that the answer in the first instance was filed by his attorney, and not by the appellant himself; but the attorney makes affidavit that he "has heard the foregoing answer read, knows the contents thereof, and believes the same to be true," and, having been in communication with the appellant with reference to these matters, it must be concluded that the matters and things which were set up in the answer were based upon information received from the appellant,—especially matters which must of necessity be known only to the parties to the action. Nor does the appellant deny the truthfulness of the allegations of the answer, just recited, although he does specifically deny that he furnished the attorney with information in regard to the alleged adultery of his wife.

In addition to what has been said in regard to the discretion vested in the lower court in matters of this kind, we will call attention to §4880 of Bal. Code, which is as follows:

"If the summons is not served personally on the defendant in the cases provided in the last two sections, he or his representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action, and, *except in an action for divorce*, the defendant or his representative may in like manner be allowed to defend after judgment, and within one year after the rendition of such judgment, on such terms as may be just;"

It would seem from this that it was the intention of the legislature to allow the defendant in a divorce action to defend at any time before judgment, but that a de-

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fendant in a divorce action was specially excluded from defending after judgment; the legislature, no doubt, having in contemplation the law allowing divorced persons to marry after six months from the date of the decree, and having in mind the injury that might ensue from the defense of a divorce action after judgment.

The judgment is affirmed.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3186. Decided April 9, 1901.]

P. F. NORDBY, *Appellant*, v. THOMAS WINSOR *et al.*,
Respondents.

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STATUTE OF FRAUDS — PROMISE TO PAY DEBT OF ANOTHER — WHEN CONSTITUTES ORIGINAL PROMISE.

A promise by a debtor to pay the debt of his creditor to a third party, made in consideration of receiving credit upon his own indebtedness, is an original promise, and not within the statute of frauds.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Reversed.

Ballinger, Ronald & Battle, for appellant.

Richard Winsor and George E. Morris, for respondents.

PER CURIAM.—This cause was begun in the superior court of King county. The amended complaint alleges, in substance, as follows: That one Barlow was the owner and master of the schooner "Port Admiral"; that as such owner and master he transported lumber for the respondents upon said schooner from Seattle, Washington, to Port Wrangel, Alaska; that the freight charges for such transportation amounted to \$396.90, which sum the respondents were owing to said schooner, and the said Barlow, as owner thereof; that the said schooner, and the said

Barlow, as owner thereof, were indebted to appellant, Nordby, in the sum of \$38, and were likewise indebted to Sunde & Erland, sailmakers, in the sum of \$212; that an agreement was made between the said Barlow and respondents by which respondents promised and agreed to pay to Nordby the said sum of \$38, and to Sunde & Erland the said sum of \$212; that as a part of said agreement respondents were to receive and did receive credit upon the said sum of \$396.90 for the amounts due Nordby and Sunde & Erland, as aforesaid; that at the time of making said agreement, and as evidence thereof, a contract in writing was entered into between the said Barlow and respondents covering the matters hereinbefore stated, a copy of which contract is attached to the complaint as an exhibit; that before the institution of this action said Sunde & Erland duly sold and assigned their said claim to appellant, Nordby, for a valuable consideration, and that he is now the owner and holder thereof. The complaint, as drawn, states two causes of action, based, respectively, upon the items of \$38 and \$212 aforesaid. A demurrer was interposed to each of said causes of action, and was by the court sustained. The plaintiff elected to stand upon his amended complaint, and thereupon judgment was entered dismissing this cause with costs taxed against plaintiff. From this judgment the plaintiff appeals.

Respondents' counsel argue that the contract set out in the complaint falls within the statute of frauds, as being a promise to pay the debt of another. We think not. The averments of the complaint show that respondents agreed with Barlow and promised him to pay the claims here sued upon in consideration of receiving from Barlow credit upon respondents' debt to him for the amount of these claims, and that such credit was given. The promise of respondents to pay the debts of Barlow due to Nord-

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by and Sunde & Erland was founded on consideration moving from Barlow, and while, incidentally, the fulfillment of the promise would extinguish the debt of another, yet it was an original promise to pay respondents' own debt, and the beneficiary of the promise may maintain an action thereon. This rule has already been announced by this court. See *Gilmore v. Skookum Box Factory*, 20 Wash. 703 (56 Pac. 934); *Don Yook v. Washington Mill Co.*, 16 Wash. 459 (47 Pac. 964).

If the complaint in this case stated a contract within the statute of frauds, then there might be some question as to the sufficiency of the written memorandum to bind respondents. The contention that it is too ambiguous to be construed as a promise to pay these debts of Barlow would then call for consideration. But, as we view the complaint, it shows a contract entirely without the statute of frauds, and which was binding upon the respondents regardless of the writing.

We think the court erred in sustaining the demurrer. The judgment is therefore reversed and the cause remanded, with instructions to the lower court to overrule the demurrer.

[No. 3221. Decided April 9, 1901.]

JOHN ANDERSON, *Respondent*, v. F. C. TINGLEY, *Appellant*.

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LOGS AND LOGGING — RIGHT OF LIEN — WAIVER BY CONTRACT.

Where a laborer employed in getting out saw logs entered into an agreement whereby the employer was not to pay therefor until he had sold the logs to some mill and received the proceeds of the sale, the laborer thereby waived his statutory right of lien by his contract to give his employer the absolute possession and power of disposal of the logs.

Appeal from Superior Court, Skagit County.—Hon. JESSE P. HOUSER, Judge. Reversed.

E. C. Million, for appellant.

PER CURIAM.—This cause is here on appeal from the superior court of Skagit county, and is an action for the foreclosure of a logger's lien. Several of the questions suggested in appellant's brief have already been decided by this court adversely to appellant in *Anderson v. Tingley*, 20 Wash. 592 (56 Pac. 371), which was an application for a writ of mandamus against the superior court, and grew out of this cause, which is now here for decision on the merits. No statement of facts is brought here with the record, and the cause is submitted on the court's findings of facts and conclusions of law. The third finding of facts is as follows, to-wit:

"That on or about the first day of November, 1898, the plaintiff and defendant entered into an agreement whereby the plaintiff was to cut, bark, swamp and tend hook in the procuring of certain saw logs, and was to receive therefor in full for all of said work the sum of one dollar per thousand feet board measure; and it was especially agreed that the amount of said logs so cut was to be determined by the mill scale or the scale at which said logs were sold to some mill on Puget Sound, and that the plaintiff should not have and receive his pay for said services until the defendant had sold said logs and received the proceeds thereof from such mill."

Were it not for the latter portion of the said finding, we should see no objection to affirming the judgment. The difficulty we encounter is in the following words of the finding, to-wit:

"It was especially agreed that the amount of said logs so cut was to be determined by the mill scale or the scale at which said logs were sold to some mill on Puget Sound, and that the plaintiff should not have and receive his pay

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for said services until the defendant had sold said logs and received the proceeds thereof from such mill."

We think the contract as found by the court must be held to negative the intention of respondent to claim a lien. He could not retain possession and dominion over the logs for the purposes of a lien and at the same time permit the appellant to sell them to some mill and pay him from the proceeds of such sale.

"There can be no lien, at common law or by usage, where the parties make a special agreement inconsistent with a lien, either for a particular mode of payment, or for payment at a future particular time, although without such agreement the right to a lien would be implied or recognized. If such agreement is antecedent to the possession, no lien is created; if it is made afterwards, the lien is waived." 1 Jones, Liens (2d ed.), § 1002.

Again, quoting from § 747 of the same volume:

"One who contracts to haul and deliver lumber on board cars, at an agreed price to be paid when the lumber is sold in the market and the proceeds are received by the owner, has no lien thereon for his labor. The obligation to deliver the lumber before payment negatives the right to detain until payment. He has waived the lien by his contract, and cannot set it up in violation of his contract."

See, also, cases cited under said sections.

We think the contract involved here falls within the rule above announced. It is true the subject of common law liens is more directly under consideration in the text quoted; but we see no difference in the principle which must apply here. Retention of possession by the lienor was a necessary element of the common law lien, and if one would maintain the statutory lien, he must also keep himself in position to retain dominion and control over the property in the method provided by statute. This the respondent cannot do under his contract. He agreed that appellant might sell the logs and pay him from the

purchase money, which can only mean that appellant was to have absolute possession, and was authorized to pass possession over to a purchaser. Respondent's counsel argues in his brief that appellant was to furnish certain supplies to respondent, and the court so finds; but we are unable to discover any finding that no supplies were furnished, and, in the absence of the evidence, we cannot say that there was a breach on the part of appellant that would operate to affect respondent's rights under the contract. Under the provisions of the contract the money was not due until the logs were sold. The findings show that the action was brought while the appellant was endeavoring to sell the logs. We think the court erred in its conclusions of law from the facts as found. The lien must be denied because of the terms of the contract.

The judgment is reversed and the cause remanded, with instructions to the court below to enter judgment for appellant dismissing the action, with costs to appellant.

[No. 3792. Decided April 10, 1901.]

RICHARD WINSOR *et al.*, as Board of Regents of the University of Washington, v. ROBERT BRIDGES *et al.*, as Board of State Land Commissioners.

SUPREME COURT -- ORIGINAL JURISDICTION -- WRIT OF PROHIBITION -- CONSTRUCTION OF CONSTITUTION.

Art. 4, § 4, of the state constitution, conferring original jurisdiction upon the supreme court to issue the writ of prohibition, must be construed in the light of the law defining the writ of prohibition which was in force at the time of the adoption of the constitution; and the law then in force having restricted the writ to its common-law function for the restraint of unauthorized judicial or *quasi judicial* power, the original jurisdiction of the supreme court is not extended to include ministerial and administrative acts by Bal. Code, § 5769, which provides that the writ of prohibition shall arrest the proceedings of any tribunal, corporation, board, or person, when such proceedings

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are without or in excess of the jurisdiction of such tribunal, corporation, board, or person. Original jurisdiction to restrain such acts is in the superior court.

Original Application for Prohibition.

Clise & King (John P. Hoyt and Richard Winsor, of counsel), for relators.

Thomas M. Vance and *Byron Millett*, for respondents.

The opinion of the court was delivered by

WHITE, J.—This is an original proceeding begun in this court by the board of regents of the University of Washington against the board of state land commissioners of the state of Washington. It is an application for a writ of prohibition, commanding the board of state land commissioners to desist and refrain from selling, or attempting to sell, or from leasing, or attempting to lease, a tract of land in the city of Seattle conveyed by Arthur A. Denny and others to the territory of Washington as a site for the University of Washington, and subsequently conveyed by quit claim deed to the state of Washington, to be sold for the best interest of the state university. The affidavit sets forth that the board of regents of the state university are in possession of said land, and are using part of it for university purposes; that they have deemed it their duty to lease a portion of the land not occupied for university purposes, and for that purpose have called for bids, and have accepted bids; and they are about to lease such portion on terms which are set out in the affidavit. The affidavit further sets out that the board of state land commissioners threaten to sell the land or lease the same at public auction for a term of five years or less, under the laws relating to the leasing and sale of school and granted lands of the state, and it is set forth in the affidavit that the board of state land commissioners have no

authority under the law to do the acts they threaten to do, and, further, that the sole authority to sell or lease said land is vested in the board of regents of the University of Washington.

Section 4, article 4, of the state constitution, defining the jurisdiction of this court, provides that

“The supreme court shall have original jurisdiction in *habeas corpus* and *quo warranto* and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. . . .”

Under this provision of the constitution, the authority of this court to issue the writ of prohibition, except where it is necessary to the complete exercise of its appellate and revisory jurisdiction, may well be doubted, and, but for a different rule announced in *State ex rel. Amsterdamsch Trustees Kantoor v. Superior Court*, 15 Wash. 668 (47 Pac. 31, 37 L. R. A. 111), we would be inclined to so hold. In *State ex rel. White v. Board of State Land Commissioners*, 23 Wash. 700 (63 Pac. 532), we followed, as to the question of original jurisdiction, the rule laid down in *State ex rel. Amsterdamsch Trustees Kantoor v. Superior Court*, *supra*. In *State ex rel. White v. Board of State Land Commissioners*, *supra*, we held that the writ of prohibition meant by § 4, art. 4, of the constitution, was practically the common-law writ, and its purpose was to restrain the exercise of unauthorized *judicial or quasi judicial power*, and that it might be invoked against any court, or body of persons, board, or officers, assuming to exercise such power; that, to warrant granting the writ to any organized body other than a court, it is necessary that the acts sought to be prohibited be *purely judicial*, and not execu-

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tive, administrative, or legislative. We are satisfied that the views there expressed are correct. The legislature, in 1895, in providing for special proceedings, enacted that:

"The writ of mandamus may be denominated a writ of mandate." Bal. Code, § 5754.

"It may be issued by any court, except a justice's or a police court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person." Bal. Code, § 5755.

"The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." Bal. Code, § 5769.

This statutory writ of prohibition is broader in its purposes than the writ of prohibition at common law, and by it the proceedings of any tribunal, corporation, board or person, whether they are acting in a judicial, legislative, executive, or administrative capacity, may be arrested, if acting in excess of their power. *Williams v. Lewis*, (Idaho) 54 Pac. 619. When the constitution was framed the Code of Washington Territory, §§ 698 and 699, read:

"The writ of prohibition shall command the court or party to whom it shall be directed, to refrain from any further proceedings in the matter therein specified, until the return of the writ and the further order of the court thereon, and upon the return, to show cause why they shall not be absolutely restrained from further proceeding in the matter.

"The court shall render judgment either that a prohibition absolute, restraining the court and party proceeding in the matter, do issue, or authorizing the court and party to proceed in the matter in question."

From the context the words "court *or* party," in § 698, should read "court and party," which substantially defines the writ as it existed at common law. When the constitution of Idaho was adopted, a law verbatim with § 5769, Bal. Code, *supra*, was in force in that territory, and had been in force for fifteen years. The supreme court of that state say:

"By section 1851, Rev. St. U. S., the legislative power of the territories was declared to extend to all rightful subjects of legislation, not inconsistent with the constitution and laws of the United States. The defining of the functions of the writ of prohibition was a rightful subject of legislation. The original jurisdiction of the supreme court of the state is defined in section 9 of article 5 of the constitution in almost the exact words of section 3816, Rev. St. Idaho. The men who formulated the constitution were familiar with the provisions of the statute. The supreme court of California (*Camron v. Kenfield*, 57 Cal. 550) say: 'The new constitution was framed in view of the construction of the language used in the former constitution, unanimously concurred in by the members of the highest tribunal of the state; yet the framers of the present constitution repeated the words employed in the former. We are forced to the conclusion that they used these words in the sense which had been attributed to them by the supreme court.' We may conclude with equal confidence that the framers of the constitution of Idaho, in defining the functions of the writ of prohibition, did so with a full knowledge of the character and functions of the writ, as the same were defined in the statutes of Idaho then existing, and which had been in force in the territory of Idaho for 15 years at least prior to the adoption of the constitution. While it is true there had been no consideration of the question by the supreme court of the territory, we think it may reasonably be presumed that the members of the constitutional convention were as well advised as to the general legislation of the territory as they were to the decisions of its supreme court. The constitution expressly continues in force all laws of the

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territory which are not repugnant to the constitution. It will hardly be contended, we apprehend, that the provisions of sections 4994 and 4995 are repugnant to the constitution. As the law defining the functions of the writ of prohibition preceded the constitution by some 15 years, and such law was continued in force by express provision of the constitution, we are, as expressed by the supreme court of California, 'forced to the conclusion' that, in providing for the issuance of the writ of prohibition in section 9 of article 5 of the constitution, they intended the writ then existing under the laws of the territory, and with the functions therein declared and defined." *Williams v. Lewis*, 54 Pac. 620.

We think the reasoning of the supreme court of Idaho is sound, and, applying the same principle here,—for the same provision continuing in force all laws of the territory which were not repugnant to the constitution is in our constitution,—it follows that the writ, as defined by our constitution, is the writ as it existed at common law, and it certainly possessed no greater functions than ascribed to it in *State ex rel. White v. Board of State Land Commissioners*, *supra*.

In Montana, where the same question arose under exactly the same circumstances as existed in Idaho, the supreme court of the former state refused to go to the extent of the Idaho court in holding that the statute enlarged the office of the writ so as to permit the arrest of proceedings not of a judicial character. That court say:

"Except as otherwise provided in the constitution, this court has appellate jurisdiction only. Section 2, art. 8, Const. It has power, in its discretion, to issue, and to hear and determine, writs of prohibition. Section 3, Id. At the time the constitution was adopted, chapter 3 of title 13 of the first division of the Code of Civil Procedure (Comp. St. 1887) was in effect, section 579 whereof provided that 'the writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tri-

bunal, corporation, board, or person, when such proceedings are without, or in excess of, the jurisdiction of such tribunal, corporation, board or person.' This section did not enlarge the common-law office of the writ so as to permit the arrest of proceedings not of a judicial character. Mandamus lies to compel the performance of a ministerial duty, whereas, under section 579, prohibition arrests judicial action in proceedings which are without or in excess of the power to hear and determine, and in this sense prohibition is the counterpart or opposite of mandamus. *State v. Second Judicial District Court*, 22 Mont. 220, 56 Pac. 219; *Maurer v. Mitchell*, 53 Cal. 289. We are aware that in *Williams v. Lewis*, 54 Pac. 619, the supreme court of Idaho entertained a different view of the provisions of a statute identical with section 579, *supra*, but we decline to approve it." *State ex rel. Scharnikow v. Hogan*, 24 Mont. 379 (62 Pac. 493).

If we adopt the view of the Montana court, the same result follows, because that court held that the common-law office of the writ was not enlarged by the statute. The board of state land commissioners assume the right to discharge the purely executive or administrative function of leasing or selling certain lands belonging to the state, and we are asked to arrest their action in this respect. At common law, or under the purposes of the writ as defined in *State ex rel. White v. Board of State Land Commissioners*, the writ here asked for cannot be issued originally out of this court to restrain such action, unless we hold that the act of 1895 confers jurisdiction upon this court. The act of 1895 (title 32, p. 1601, Bal. Code), aims also to regulate the practice generally in certiorari, mandamus, and prohibition proceedings. We have no doubt that the legislature has the power to regulate the practice in such proceedings, so that the remedy is substantially preserved. The legislature has not the power, however, to create additional remedies under the name of such writs, and confer thereby on this court original jurisdiction for the en-

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forcement of such remedies. The original jurisdiction of this court is fixed by constitutional limitations, and is derived from the constitution, and not in pursuance of any legislative enactment. In the case of *Marbury v. Madison*, 1 Cranch, 157, the supreme court of the United States decided that such court derived its jurisdiction from the United States constitution; that it was not within the power of Congress to confer further or additional jurisdiction upon that court. The distinction drawn between the federal and state governments in matters of legislation, that the former is one of delegated powers, while the latter is one of limitations, does not affect the reasoning in *Marbury v. Madison*, *supra*, as applicable to the case at bar, that this court's original jurisdiction must be measured by the constitution of the state from which it derives its existence and power. See, also, *State v. Hogan*, *supra*. The superior court has jurisdiction over "such special cases and proceedings as are not otherwise provided for." Article 4, § 6, of the constitution. While it is provided in the same section that the superior court has jurisdiction to issue writs of prohibition, meaning, undoubtedly, the common-law writ, there is nothing in the constitution forbidding the legislature, in the exercise of its legislative powers, from providing a proceeding analogous to the writ of prohibition, and making the same applicable in arresting executive, administrative, or legislative action by tribunals, corporations, boards, or persons. But when this is done the original jurisdiction to issue such writs is in the superior court, under the clause above quoted from § 6, art. 4, of the constitution, and in such matters this court can only exercise appellate jurisdiction. In California it has been held that the legislature, under provisions of a constitution similar to our own, could not enlarge or extend the office of the writ of prohibition so as to include

ministerial functions; the reason assigned being that, because the constitution specified such writ, the common-law writ was intended, and every other character of the writ was thereby necessarily excluded. *Farmers' Union v. Thresher*, 62 Cal. 407; *Hobart v. Tillson*, 66 Cal. 210 (5 Pac. 83).

The same question came up in Utah under the organic act conferring on the legislature power to legislate on all rightful subjects of legislation. The territorial court say:

"The district courts have general common-law and chancery jurisdiction, and that covers about everything of a civil or criminal nature not expressly committed to some other tribunal; *Ferris v. Higley*, 20 Wall. 375. We can readily see that this general jurisdiction would embrace the common-law writ of prohibition, and that the legislature could in no way deprive the district courts of such jurisdiction. But the legislature, in pursuance of its authority given by the organic act to legislate upon all 'rightful subjects of legislation,' has seen fit, and has the undoubted right, as occasions arise, to create new offenses, new subjects for judicial investigation, and new ways and means to enforce the authority of the courts and officers, and we can see no reason to conclude that the giving of additional power to the writ of prohibition was not a 'rightful subject of legislation.'" *People v. House*, 4 Utah, 369 (10 Pac. 838); *State v. Hogan*, *supra*.

The construction given by the California court, it seems to us, is too narrow and technical.

We conclude that original jurisdiction to issue the statutory writ of prohibition against the board of state land commissioners to arrest their contemplated action in selling or leasing the lands in controversy is in the superior court, and not in this court, and we have no original jurisdiction in the premises, and for that reason we will not pass on the merits of the application. These can only be inquired into on appeal. The writ should be denied, for

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lack of original jurisdiction, and these proceedings dismissed.

REAVIS, C. J., and DUNBAR, FULLERTON and ANDERS, JJ., concur.

[No. 3853. Decided April 10, 1901.]

A. S. FARQUHARSON, *Appellant*, v. D. W. YEARGIN *et al.*,
as *County Commissioners of Ferry County, Respondents*.

24 549
25 551

CREATION OF NEW COUNTY — NECESSARY POPULATION — LEGISLATIVE DETERMINATION — PRESUMPTIONS.

Where a new county has been set off from another county, under art. 11, § 3, of the constitution prohibiting the formation of new counties containing a less population than 2,000, the failure of the legislative records to recite the fact that such new county contains a population of not less than 2,000 would not render the creation of such county illegal, since the legal presumption is that this fact must have been proved to the satisfaction of the legislature and that the passage of the act itself is equivalent to a finding of the necessary facts.

SAME — APPOINTMENT OF PROVISIONAL COUNTY OFFICERS.

Although art. 11, § 5, of the constitution provides for a general and uniform law governing the elections of county officers, a provision in Laws 1899, p. 26, § 5, authorizing the governor to appoint the county commissioners in the newly created county of Ferry, and that they should fill by appointment all other county offices, is not unconstitutional, since the power to fill county offices provisionally in new counties is a necessary incident of the legislative power to create new counties.

COUNTY INDEBTEDNESS — CONSTITUTIONAL LIMIT — COMPULSORY OBLIGATIONS — SALARIES.

Warrants issued in payment of salaries of county officers, although in excess of the limit of one and one-half per cent. of the assessed valuation of property, are valid, on the ground of being compulsory obligations imposed upon the county by the constitution and laws of the state.

SAME — CONSTRUCTION OF NEW COURT HOUSE.

Warrants issued in payment for the construction of a county court house properly fall under the rule of compulsory obligations

when it appears that, at the time such indebtedness was incurred, the county seat was a new mining camp composed of small frame cabins and tents, the town having been recently destroyed by fire; and that it was necessary, for the proper and orderly administration of county affairs, for the protection and safe keeping of the public records, and in order to provide a place to hold court for said county, that a court house should be constructed, since it may be fairly inferred from existing conditions that no suitable building could otherwise be had.

Appeal from Superior Court, Ferry County.—Hon. CHARLES H. NEAL, Judge. Affirmed.

Charles P. Bennett, for appellant.

Jesseph & Jesseph, for respondents.

The opinion of the court was delivered by

WHITE, J.—This action was commenced by plaintiff against the defendant for the purpose of having the defendants enjoined from issuing county bonds to the amount of \$60,000, the purpose of such bond issue being to fund outstanding county warrants of Ferry county. Ferry county was created by the act of the legislature of the state of Washington on the 21st day of February, 1899. On March 11, 1899, the governor appointed a board of county commissioners for the newly created county, as provided in the act creating the county.

The assessed valuation of the property in the newly created county was \$408,513, on October 7, 1899, such valuation being agreed upon by the officers of Ferry and Stevens counties, and was based upon the assessment of Stevens county.

Ferry county was formed out of part of the territory theretofore included in Stevens county, and the act organizing Ferry county provided that Ferry county should assume and pay to Stevens county its just proportion of the debts of Stevens county in the proportion that the assessed

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valuation of Ferry county bore to the valuation of the whole of Stevens county. Ferry county, as provided in art. 11, § 3, of the constitution, was not to be charged with any debt or liability incurred in the purchase of any county property or building which should fall within and be retained by Stevens county, and the same provision applied to Stevens county as to any county property or buildings in Ferry county. The auditor of Ferry county and the auditor of Stevens county were to apportion the indebtedness that Ferry county was to pay, and the county commissioners of Ferry county were to order warrants drawn for such indebtedness in favor of Stevens county.

Between the 21st day of March, 1899, and the 7th day of October, 1899, county warrants were issued to the amount of \$23,323.99. The cash receipts of the county during this period from licenses and fines was \$10,573.10. Add to the cash received, one and one-half per cent. of the assessed valuation, \$6,127.69, and deduct the amount from the amount of warrants issued during this period, and we have warrants issued in excess of said amount to the amount of \$6,623.20.

That of the warrants to the amount of \$6,623.20 in excess of the constitutional limit of indebtedness of Ferry county there remain unpaid at this time warrants to the amount of \$2,136.71. That of the said amount of \$23,323.99 of warrants issued \$15,303.56 were issued in payment for a county court house for said county of Ferry, and furniture for the same; \$4,156 being for blank books, and \$4,233.50 being the amount paid for transcribing records from Stevens county records, as required by the act creating the new county. Between the 11th day of March, 1899, and the 7th day of October, 1899, Ferry county acquired assets to the amount of \$15,303.56 in

addition to the cash received. Republic, the county seat of Ferry county, was, at the time this indebtedness was incurred, a new mining camp composed of small frame cabins and tents, the town having been destroyed by fire on the 3d day of June, 1899, and it was necessary, for the orderly and proper administration of county affairs, for the protection and safekeeping of the public records, and in order to provide a place to hold court for said county, to construct a court house.

On the 9th of July, 1900, when the board of county commissioners of Ferry county adopted the resolution to issue funding bonds in the sum of \$60,000, the assessed valuation of the taxable property in Ferry county, as shown by the last assessment for state and county purposes, was \$1,917,819, and the outstanding indebtedness of the county about \$60,000, all of which was in outstanding warrants; the said sum of \$2,136.71 being part of said warrant indebtedness, and the only warrants the validity of which is questioned on this appeal. No vote of the electors of Ferry county has ever been had validating said last mentioned indebtedness, or assenting to the same. The court below, on the above state of facts, denied the injunction prayed for, and entered final judgment. From the judgment of the court denying the relief prayed for this appeal is prosecuted. It is urged by the appellant that the proposed bond issue is illegal, because it nowhere appears in the records of the lower house or the senate that the territory proposed to be set off as Ferry county had, at the time of presenting the petition to create such new county, a population of two thousand, as required by § 3 of art. 11 of the constitution of the state. The provision cited declares that "No new county shall be established which shall reduce any county to a population of less than four thousand, nor shall a new county be formed

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containing a less population than two thousand.” The creation of a new county is an exercise of legislative power subject to the limitations referred to. Before this power can be rightfully exercised, it must be made to appear to the legislature affirmatively that the new county contains a population of not less than two thousand, and that by the creation of the new county the population of the county from which the new county is taken is not reduced to less than four thousand. When these facts are made to appear to the satisfaction of the legislature, then the act creating the proposed new county may be passed. The legal presumption, therefore, is that, when the act creating the county of Ferry was passed, these facts had been proved to the satisfaction of the legislature; otherwise, that body would not and could not have passed the act. All of the members of the legislature were sworn to support the constitution of the state, and it is not to be presumed that the legislature would violate their oath of office by passing the act, without the proof necessary to enable them to do so. The act appears to have been approved by the governor, and the same presumption attaches to his act of approval. As was said by the supreme court of West Virginia in *Lusher v. Scites*, 4 W. Va. 11:

“To exercise the power, the legislature must inform itself of the existence of the facts prerequisite to enable it to act on the subject. How it shall do so, and on what evidence, the legislature alone must determine; and when so determined, it must conclude further inquiry by all other departments of the government; and the final action terminating in an act of legislation in due form, must of necessity presuppose and determine all the facts prerequisite to the enactment; and that, too, as fully and as effectually as a final judgment of a competent judicial tribunal of general jurisdiction would do in like case.”

We do not think that it is necessary that the records of the senate or the house should contain a recital of the facts determined by the legislature relative to population, any more than a final judgment in a court of general jurisdiction should contain a recital of the facts upon which it is based.

Courts, in considering such acts, unless contrary facts appear affirmatively in the act under consideration, must assume that legislative discretion has been properly exercised. If evidence was required of a fact, it must be supposed that it was before the legislature when the act was passed; and, if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding. Cooley, *Constitutional Limitations* (5th ed.), p. 222; *State ex rel. Attorney General v. County of Dorsey*, 28 Ark. 379; *Rumsey v. People*, 19 N. Y. 48.

Section 5 of the act creating and organizing Ferry county provides that the county commissioners should be appointed by the governor (Session Laws 1899, p. 26), and that they should fill by appointment all other county offices. Such appointment of county commissioners by the governor is not in contravention of the constitution, which requires that all county officers shall be elected by the people, as these provisions do not apply to cases of emergency; such as the creating of the usual county offices, on the organization of a new county. The power to fill county offices provisionally in new counties is a necessary incident of the legislative power to create new counties, although the constitution (article 11, § 5) provides for a general and uniform law governing the elections of boards of county commissioners, sheriffs, treasurers, and other county, township, precinct, and district officers. *State ex rel. Clarke v. Irwin*, 5 Nev. 111; *State ex rel.*

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Williams v. Mayhew, 21 Mont. 93 (52 Pac. 981); *Roche v. Jones*, 87 Va. 484 (12 S. E. 965); *In re Board of Com'rs of Johnson County*, 32 Pac. 850 (S. C.—*In re Fourth Judicial District*, 4 Wyo. 133).

It is contended that the warrants issued after the county had reached its limit of indebtedness were illegal. It appears that these warrants were issued for salary purposes, and to complete the payment upon the county court house, and aggregate \$2,136.71. The warrants issued for the purpose of paying the salaries of county officers, amounting to \$812.81 of this sum, clearly fall within the decision of this court in *Rauch v. Chapman*, 16 Wash. 568 (48 Pac. 253, 36 L. R. A. 407, 58 Am. St. Rep. 52), as compulsory obligations imposed upon the county by the constitution and laws of the state. At the time the court house was erected, such a county building was absolutely necessary for county officers and a proper care of the county records. Republic, the county seat, was a new mining camp, and but a short time before had been destroyed by fire. Most of the buildings were small frame cabins, none of them being suitable places to deposit the county records, or to accommodate the county offices. While, ordinarily, warrants issued in payment of money expended in building a court house would not fall under the class of compulsory obligations, the conditions existing in Republic at the time of the erection of the court house were such as to bring the warrants for the erection of this particular court house within the rule laid down in *Rauch v. Chapman*, *supra*, because it may be fairly inferred that no other building could be had for the purpose owing to the destruction of the town by fire.

The judgment of the court below is therefore affirmed.

REAVIS, C. J., and DUNBAR, MOUNT, FULLERTON and HADLEY, JJ., concur.

[No. 3420. Decided April 12, 1901.]

WILLIAM C. HENCKE, *Respondent*, v. WILLARD H. BABCOCK *et ux.*, *Appellants*.

MASTER AND SERVANT — DEFECTIVE MACHINERY — INJURY TO SERVANT
— CONTRIBUTORY NEGLIGENCE.

In an action to recover for personal injuries, the refusal of the court to instruct the jury to find for defendant, on the ground of plaintiff's contributory negligence, was proper when the evidence showed that plaintiff, while tending the separator of a threshing machine had the engine stopped so that he could remove and substitute concaves in the cylinder of the separator and straighten the teeth on such concaves; that while he had his hands in the cylinder engaged in such work the engine, owing to its leaky, defective and worn out condition, which was unknown to plaintiff, but of which defendant had knowledge, started automatically after it had been stopped by the engineer, communicating power to the separator and causing the cylinder to revolve, whereby plaintiff's hands were so badly lacerated that amputation was necessary; that there would have been no opportunity for the cylinder to be set in motion, if plaintiff had removed the pin holding together the knuckles of two sections of a revolving tumbling rod, which was used to communicate power from the engine to the separator, but it was never customary to disconnect the separator from the source of power in that way; that the cylinder could have been held from turning by the insertion of an iron bar so as to catch its teeth, but such a method was not customary as it was necessary to slowly turn the cylinder when examining whether its teeth and those of the concaves interfered; and that the evidence as to defendant's having instructed plaintiff to use an iron bar for the purpose of holding the cylinder was conflicting.

INSTRUCTIONS — WITHDRAWAL OF REQUEST FOR WRITTEN INSTRUCTIONS — EFFECT.

Where appellants did not ask for written instructions, nor join respondent in his request therefor, the appellants cannot urge the objection on appeal that they had no knowledge of respondent's having withdrawn his request for written instructions, and that they relied on the instructions being given in that form, and not orally.

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SAME — LENGTH OF — DISCRETION OF COURT.

The length of the instructions given by the court to the jury is a matter within its discretion, and error cannot be predicated thereon, as long as the instructions given contain correct statements of the law as applied to the particular case.

Appeal from Superior Court, Walla Walla County.—
Hon. THOMAS H. BRENTS, Judge. Affirmed.

Struve, Allen, Hughes & McMicken, P. J. Cavanaugh
and *Thomas & Dovell*, for appellants.

B. L. & J. L. Sharpstein and *William H. Upton*, for
respondent.

PER CURIAM.—This action was commenced in the superior court of Walla Walla county, and was brought by the respondent against appellants to recover damages for personal injuries received by respondent while working with a threshing machine owned and operated by appellants. The complaint shows that appellants were husband and wife, and engaged in the business of farming, and of threshing their grain raised on their own land, and also the grain of other persons; that the respondent was a blacksmith by trade, and a blacksmith and a separator tender by occupation, well skilled in both of said occupations, and capable of earning at said occupations the sum of \$3.50 per day during every working day of the year; that on the 3d day of August, 1898, he was forty-five years old, healthy, robust, industrious, and active for his years, and but for the injury complained of would have continued capable of earning, and would have earned, said sum per day continuously for many years to come; that on the 3d day of August, 1898, he was employed by appellants as a separator tender in their business of threshing their grain upon a certain farm in said county commonly known as the "Kimball Ranch;" that the separator by

which said threshing was done, and which respondent was employed to tend, was on said day propelled by a certain steam engine owned and furnished by appellants, which said steam engine then was, and was by appellants then and there well known to be, old, worn out, leaky, defective, dangerous, liable to start automatically and suddenly after it had been stopped by the engineer, and entirely unsafe to be used in propelling a separator; that the appellant Willard H. Babcock, was an experienced machinist and steam engineer, and respondent was without experience, knowledge, or skill in any matter relating to engines, and had no knowledge whatever of any of the defects of said engine; that one of respondent's duties as such separator tender was to remove from time to time the concaves of said separator, and substitute other concaves therefor and straighten the teeth on the concaves and cylinder of said separator, for the safe performance of which duty it was necessary that said engine should be stopped and remain stopped until said duty was completed; that while respondent was so employed, and was engaged in and about the removal and substitution of said concaves and the straightening of said teeth, and after said engine had been stopped for the purpose of permitting the performance of said duty, said engine, without the knowledge of respondent, and without any fault or negligence on his part, but solely because of the defective and unsafe condition of said engine aforesaid, suddenly and automatically started in motion, and thereby caused the cylinder of said separator to revolve at a high rate of speed, and respondent's hands were thereby caught between the teeth of said cylinder and the teeth on said concaves, and were so cut, torn, crushed, bruised, and lacerated that, in order to save respondent's life, it became necessary to amputate his left hand, and parts of the second and third

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fingers and two joints of the fourth finger of his right hand, by reason whereof he alleges that he is damaged in the sum of \$20,000, and in the further sum of \$182.50 for indebtedness incurred in medical and surgical treatment; and he prays judgment for the aggregate of said sums. The answer denies the material allegations of the complaint, and affirmatively avers contributory negligence on the part of the respondent, as follows, to wit:

“At the time the said plaintiff undertook the employment of separator tender for said defendants, he at all times well knew and was informed that it was necessary in order to, with safety to himself, repair or clean the cylinder teeth or concave teeth described in the complaint, that he should insert in the cylinder of said machine a certain iron rod furnished to him for said purpose, or adopt other means so that said cylinder might be held fast and would not move while the said teeth were being repaired or cleaned; but the said plaintiff, disregarding said knowledge and said information, on the said 3d day of August, 1898, undertook to repair and clean the cylinder teeth and concave teeth of said machine when the same had become clogged and stopped, while the engine furnishing the motive power to said separator was in motion, and without causing the said engine to stop, and without inserting in said cylinder in which the said concaves were the said iron bar so furnished him to be inserted for said purpose, and without disconnecting said separator from said engine and without adopting any method whereby said cylinder should be held stationary while said cleaning and repairing was being done; so that, by reason of such carelessness, negligence and fault of the said plaintiff, and without any carelessness, negligence or fault of said defendants, or either of them, said cylinder suddenly started to turn and caused thereby the injury complained of.”

The case was tried before a jury, and a verdict returned against appellants in the sum of \$5,182.50. Appellants

thereupon interposed a motion for a new trial, which was overruled, and they then appealed to this court.

Appellants' first assignment of error is as follows: "Error of the court in refusing to instruct the jury to find for the defendants;" which refusal was excepted to. Counsel insist that respondent, Hencke, was guilty of contributory negligence in not removing the tumbling rod before placing his hands in the cylinder. It appears from the evidence that the engine communicated its power to the separator by means of a revolving tumbling rod, which consisted of sections united by means of knuckles and pins, and two sections could easily be disconnected by removing the pin holding the knuckles together. It is contended that Hencke should have disconnected this rod before commencing his work at the cylinder, thus making it impossible for any power to be communicated to the cylinder. Witnesses testified that they had never seen this done, but that they themselves and others whom they had observed had always done this work at the cylinder and concaves without disconnecting the separator from the source of power. Certainly there was sufficient evidence upon this subject to justify the jury in believing that an ordinarily prudent man would not think it necessary to disconnect the engine from the separator in the absence of knowledge on his part that the engine was defective and liable to start automatically. It must have been manifest to the jury from the evidence that a man of ordinary prudence would have a right to expect that when the engine was stopped it would remain stationary until started by the act of the engineer in charge. The testimony shows that the engine was stopped for the express purpose of giving Hencke an opportunity to adjust the teeth on the cylinder and concaves, and, if the jury believed from the evidence that he had no knowledge of any defect in this engine,

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then they were justified in finding that he was acting the part of an ordinarily prudent and careful man when he was doing this work, and that he had a right to believe the power would remain inactive until he had finished, and had so informed the engineer. As to the knowledge of Hencke concerning the condition of this engine, the jury heard the following testimony of himself:

"Question. Are you an engineer?

Answer. No, sir.

Q. Had you discovered any defect in this engine?

A. No, sir.

Q. You did not know anything about it?

A. No, sir."

The jury must have believed the above evidence, and it is sufficient to sustain the finding that Hencke knew of no irregularity in this engine, and was acting the part of a prudent man, when he worked at the cylinder without disconnecting the tumbling rod.

It is next contended that Hencke was guilty of contributory negligence in not inserting an iron bar so as to catch the teeth of the cylinder, and thus hold it from turning, and it is asserted by counsel that Willard H. Babcock, one of the appellants, had instructed Hencke to use such a bar when working at the cylinder and concave. There is a conflict in the testimony upon this point. Babcock and one or two other witnesses testified to a conversation which is said to have occurred when a number of persons were present, including Hencke, in which conversation Babcock referred to an occasion when his own hand was caught by the cylinder, and he said, in substance, that he would not take chances himself any more, but had since always used the bar, and wanted every one else to do it, as he did not want any one hurt. Hencke denies hearing this conversation. The jury were expressly instructed by the court that if they found from the evidence that Hencke

had been instructed by Babcock to use such iron bar, and that he then neglected to use it, in that event Hencke could not recover. The jury must, therefore, have believed Hencke's testimony, and must have found that no such instruction was given. In the absence of such instruction, the same principles apply to the use of the iron bar that have already been discussed in connection with the tumbling rod. A number of witnesses testified that they had never known such a bar to be used, but they themselves as separator tenders had always done the work without such a bar, and had always seen it so done. But, even though it were more prudent to use such a bar to hold the cylinder while in the act of straightening the teeth or of removing and inserting concaves, yet it was necessary, as the testimony shows, to turn the cylinder slowly in order to discover if the teeth of the cylinder and concaves interfered, as that was the very purpose of the examination. There is much evidence to the effect that such turning is almost universally done with the hands, and that to use a bar for such purpose would subject one to much danger if the power were suddenly applied. The testimony, we think, shows that Hencke was engaged in this very act of turning the cylinder to make the test above mentioned when this accident occurred. We therefore think Hencke cannot be held chargeable with negligence for not using the iron bar unless he had been expressly instructed so to do, and, as already said, the verdict of the jury, under the court's instructions, says that Hencke had no such instructions from Babcock. This court has held that the question of contributory negligence is for the jury to determine from all the facts and circumstances of a particular case, and that it is only in rare cases that the court would be justified in withdrawing it from the jury. *McQuillan v. Seattle*, 10 Wash. 464 (38 Pac. 1119,

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45 Am. St. Rep. 799); *Steele v. Northern Pacific Ry. Co.*, 21 Wash. 287 (57 Pac. 820). We think, therefore, that the court properly refused the request to instruct the jury to return a verdict for defendants.

There is much evidence bearing upon the defective condition of the engine, to the effect that by means of a defective valve there was such leakage of steam as was liable to start the engine at any moment, and that it was this condition that caused it to start while Hencke's hands were in the cylinder. The fact is, as shown by the testimony, that it did start suddenly and unexpectedly, and the jury should determine if it was because of the defective condition of the engine. There was evidence to the effect that Babcock knew of such defective condition, and that he had said he would wait until they finished threshing at the Kimball ranch before he would have it repaired.

Appellants' fifteenth assignment of error is as follows:

"Error of the court in giving a portion of the instructions orally after request for written instructions had been made and against the objection of defendants' counsel."

We learn from the record that respondents' counsel requested the court to instruct the jury in writing, but immediately thereafter withdrew the request. It appears, however, that appellants' counsel did not hear the announcement of the withdrawal of the request for written instructions. The court thereafter gave a portion of his instructions orally, and upon the return of the jury from the jury room with a request from them for further instructions, he again instructed them to some extent orally. Appellants' counsel now except to the course of the court in instructing orally after the request of respondent's counsel for written instructions, on the theory that as they did not hear the withdrawal of the request by respondent's counsel, they had a right to expect that the instructions

would be given in writing. Respondent had an undoubted right to ask for written instructions, and he had also a right to withdraw the request. The case then stood as if no such request had been made. Appellants had the same right, but it nowhere appears that they made such a request. They relied upon the fact that respondent had made a demand for written instructions, and now complain that they were not given in writing. If they desired written instructions they should have *joined* with respondent in the request. But they are now in no position to complain.

Appellants' sixteenth assignment of error is as follows: "Error of the court in instructing the jury at such length that they were misled and confused." The instructions were long, it is true, there being sixty numbered instructions. We recognize it to be the duty of the trial court to state the law to the jury as succinctly and directly as possible, so that they may not become confused. It is impossible, however, for us to lay down any rule, and say that instructions of a given length may have confused the jury. This must rest largely in the discretion of the court trying the cause, as long as the instructions given contain correct statements of the law as applied to the particular case. We realize that there is a tendency with trial courts to give voluminous instructions in what they deem to be important cases, but we do not believe this practice arises so much from the volition of the courts themselves as from the practice of counsel in submitting requests for numerous and extensive instructions. The judge, with a sincere desire to be fair, and fearing that he may commit error if he shall decline to give a requested instruction that contains a statement of the law applicable to any fact in the case, is thus often led, in the haste and pressure of a jury trial, to repeat himself, and to make his instructions longer than he otherwise would. In the case at bar we note from the

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record that appellants' counsel, who complain of the long instructions, submitted at least twenty requests for instructions, and, with perhaps an equal or greater number of requests from respondents' counsel, the court was confronted with the task of segregating from all these a statement of what he believed to be the law of the case. We would suggest that it is the province of counsel, when submitting requests for instructions, to assist the court in simplifying them by making the requests as brief and direct as a clear and concise statement of the law will permit.

The remaining assignments of error upon the court's instructions we do not deem it necessary to discuss, for the reason that we think the instructions, taken as a whole, fairly state the law applicable to the case. Upon the whole, we find no substantial error in the record.

The judgment is therefore affirmed.

[No. 3752. Decided April 13, 1901.]

FLORIAN DANUSER, *Appellant*, v. M. SELLER & Co., INCORPORATED, *Respondent*.

MASTER AND SERVANT—SAFE PLACE TO WORK—ASSUMPTION OF RISKS.

Where it was the custom in a store building having an elevator running from the basement to the second floor for any of the employees, without the ringing of a bell, to move same at his own convenience by pulling a rope, an employee whose business it was to make use of such elevator must be held as having assumed the risk of his employment, and where, while engaged on one floor in loading the elevator, he backed into the open shaft and fell to the basement by reason of the elevator having been moved without warning, by another employee, he cannot recover for his injuries.

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Appeal from Superior Court, Spokane County.—Hon. JESSE P. HOUSER, Judge. Affirmed.

John A. Peacock and Thomas C. Griffiths, for appellant.

F. T. Post, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This was an action for damages for personal injury. At the close of plaintiff's testimony, defendant moved for a non-suit upon the grounds: (1) That the evidence did not establish any negligence on the part of the defendant; (2) that the evidence established that plaintiff assumed the risks in connection with his employment as to the use and operation of the elevator; (3) that the plaintiff was guilty of contributory negligence; (4) that the injury, if caused by anybody's negligence, or anybody's besides the plaintiff's, was by the negligence of his fellow servant. This motion was granted by the court below.

The action was brought by an employee of the respondent, a mercantile establishment in the city of Spokane. The building consisted of a first and second floor and a basement, the basement being about twelve feet deep, and the distance between the first and second floors being about fourteen feet. The first floor was used by the respondent as a retail store, the second floor for a stock room, packing room, etc., and the basement for a general store room. Running from the basement to the second floor was an elevator, which was used for the purpose of taking goods to and from the basement and second floor. This elevator way in the basement was open. On the first floor it was inclosed on three sides by a partition; and on the fourth side, opening on Main street, it had a gate about three feet high, made of wooden slats, several inches apart, the

gate being made to slide up and down by means of a weight and rope run over a pulley, worked by hand. On the second floor there were similar slat gates on two opposite sides of the elevator shaft, with a slat railing on the third, and the wall of the building on the fourth, side. On the first floor, on the side opening on Main street, there was an entrance way to the sidewalk. The elevator was run by an electric motor in the basement, and was started and stopped by means of a rope connected with the machinery in the basement, and run up one corner of the elevator way to the top of the second story. At the time of the accident respondent had received a car load of tinware, and appellant went to the first floor with the elevator, and, with a truck, proceeded to load the elevator, as he was directed. He had placed one box on the elevator, when he was hallooed to by the city delivery man that he wanted the elevator, and told him that he could not have it. Appellant then proceeded with his work, went to the sidewalk, placed a box on the truck, and backed up towards the elevator with the truck. When he came to the shaft, the elevator had been taken up by the drayman, and the appellant backed into the shaft, fell down the same, the box and truck falling on top of him, and he thereby received the injury for which he seeks to recover.

We think the court committed no error in granting the non-suit. It is well established that the employer must furnish the employee with a safe place to work, but it is just as well established that the employee assumes the risks of apparent peril. The testimony in this case shows that the appellant had been working for the respondent in this building for several months, and, while he was technically called a stock clerk, it is evident that he had frequent occasion to use the elevator. The testimony shows that it was the habit of the employees, instead of ringing for the

elevator, to pull in backwards and forwards by a rope which was attached to it, each employee accommodating himself. This custom was known to the appellant. He knew that, if the elevator had been taken from the position it occupied where he was using it, there would be no protection against falling into the shaft. There was no latent defect shown in the machinery of the elevator. There was no hidden danger. The appellant blindly approached the shaft, not taking any thought of his position, or any pains to discover whether or not the elevator was in its position. The very fact that the drayman had demanded the elevator of him, although he told him that he could not have it, was sufficient to have put him on his guard in this respect. It being true, then, that the risk from the elevator, such as it was, was assumed by the appellant, it is not necessary to discuss the errors alleged in appellant's brief.

The judgment of the lower court is affirmed.

REAVIS, C. J., and FULLERTON, ANDERS and MOUNT, JJ., concur.

[No. 3762. Decided April 13, 1901.]

SPOKANE AND VANCOUVER GOLD AND COPPER COMPANY,
Respondent, v. J. A. COLFELT *et al.*, *Appellants*.

EVIDENCE — HEARSAY — ADMISSIBILITY AS RES GESTAE.

In an action to recover a mining claim, in which the issue was as to whether plaintiff and its assignors had performed the necessary amount of development work for the year 1898, the testimony of a witness that one of the original owners had pointed out to him the work done on the claim in 1898 is hearsay evidence, and is not admissible, even on the ground of being part of the *res gestae* surrounding the negotiations for the purchase of the claim, since the matter in contention was whether the requisite amount of work had been done, and the negotiations for the purchase of the claim were not in dispute.

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SAME.

The admission of testimony by the witness who had given hearsay testimony as to the development work of 1898 having been pointed out to him by the person who claimed to have done the work, that he had made efforts to procure the attendance of such person at the trial, but was unable to secure him as a witness, was erroneous, since the incompetency of hearsay evidence cannot be cured by showing that a witness who will testify to the fact cannot be found.

SAME—PRESUMPTIONS IN AID OF JUDGMENT.

It will be presumed in aid of a judgment, where the instructions are not before the appellate court for review, that errors of the trial court in the admission of testimony were corrected by withdrawing the objectionable testimony from the jury, since the presumption naturally attaches, where the record shows that the trial court acted affirmatively in the commission of error, that it maintained the same view of the law to the end of the case.

Appeal from Superior Court, Clarke County.—Hon. ABRAHAM L. MILLER, Judge. Reversed.

C. D. Bowles and Pipes & Tift, for appellants.

Robertson, Miller & Rosenhaupt, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—Respondent's motion to strike the record has been heretofore disposed of.

This is an action brought by the respondent to recover of the appellants a mining claim. The appellants made location on the claim upon the theory that the respondent had not performed \$100 worth of labor and development work for the year 1898, which was necessary to secure to it the possession of the claim; and whether or not the respondent performed that amount of labor on the claim in the year 1898 is the issue in this case, it being conceded that, if it did, its title to the claim is good, and, if it did not, the title of the appellants to the claim is good. The respondent claims to be the owner by virtue of an as-

signment made by one W. E. Satterfield and one C. H. Munkton, the original owners, to A. H. Kenyon, and conveyance made by said Kenyon to respondent on the 26th day of January, 1899, the allegation of the complaint being that on the 13th day of February, while the respondent was in possession, the appellants wrongfully and unlawfully took possession, and have withheld same ever since. During the trial, witness Kearney, over the objection of the appellants, testified that Satterfield pointed out to him on the claim the work that he had done in 1898. This was evidently hearsay testimony, for, while Kearney testified that he could distinguish the work of 1898 from that of 1897, and it was competent for such testimony to be introduced, and while the jury may have believed the testimony of Kearney in that respect, the evidence in relation to what Satterfield said to him was evidently for the purpose of strengthening the testimony of Kearney in that respect in the minds of the jury. They might have doubted whether Kearney would have been able to have told the old work from the new by the appearance of the rock, but when it was asserted that Satterfield had pointed out to Kearney the work which was done in 1897, and that which was done in 1898, the jury would naturally regard such assertion as strengthening and corroborating the testimony of Kearney. It was, therefore, prejudicial to the appellants' interest. It is contended by the respondent that the testimony was properly admissible; that it was part of the *res gestae* surrounding the negotiations for the purchase of the claim; that it was not admitted for the purpose of proving that Satterfield had done the work, but for the purpose of showing that, in becoming familiar with this property, certain of the work was pointed out. This testimony, however, was not of the *res gestae*. The negotiations for the purchase of the claim were not in

April, 1901.] Opinion of the Court—DUNBAR, J.

dispute, but the matter in contention was whether the requisite amount of work had been done. Hearsay evidence, to be admissible as part of the *res gestae*, must relate to the transaction in dispute, and must be so closely related to it as to serve to explain the transaction itself. Following this testimony, the court, over the objection of appellants to the question, "Have you made efforts to get Mr. Satterfield here?" allowed the witness to testify that he had looked for him, and made inquiries for him, and had been unable to find him to have him there as a witness. The admission of this testimony was plainly erroneous. As is well said by the counsel for appellants: "The ruling of the court is in effect a holding that hearsay evidence becomes competent when the witness cannot be found. If the former evidence was competent, it could not matter whether the witness could be found or not. If it was incompetent, its incompetency could not be cured by a showing that he could not be found."

Objection was also made to the testimony of witnesses Kearney, Winan, Zigler, and Bruner, that they had worked on the mine on the 28th, 29th, and 30th of January, and the 1st of February, after the time for working had expired. This testimony could in no way aid the contention of the respondent that it had done the requisite amount of work on the claim, but we think the exception to it was not sufficiently definite.

It is insisted by the appellants that, even conceding the admission of the testimony to be erroneous, inasmuch as the case was tried by a competent court and jury, and inasmuch as the instructions are not before this court for review, this court will presume, in aid of the presumption that the judgment of the lower court is right, that the court had delivered such instructions as fully covered the law of the case, and the presumption will obtain that in-

structions withdrawing the objectionable testimony from the jury have been given; but it occurs to us that this is carrying the presumption in aid of the judgment too far. It would be more consistent with reason to conclude that the court instructed the jury in harmony with its rulings in relation to the admission of testimony. Where the record does not speak, the presumption will be that all was done that should have been done to sustain the judgment of the court; but, where it appears from the record that the court affirmatively acted in a manner which this court finds to be erroneous, the presumption must attach that the court maintained the same view of the law to the end of the case.

The judgment will be reversed, and a new trial granted.

REAVIS, C. J., and FULLERTON, ANDERS and MOUNT, JJ., concur.

[No. 3765. Decided April 13, 1901.]

A. L. BROWN and ANNIE M. BROWN, *Executors, et al.*,
Appellants, v. IRVIN BARUCH, *Respondent*.

LANDLORD AND TENANT — ACTION FOR POSSESSION — PLEADING —
AMENDED ANSWER — DEPARTURE.

In an action by the owners of premises to recover restitution and damages for detention, in which defendant pleaded a surrender and cancellation of an outstanding unexpired lease held by another, and that thereupon plaintiffs entered into an express agreement with him, whereby he was to have possession of the premises described for a period of one year, the filing of an amended answer by defendant, after issue joined, setting up certain facts by way of an equitable estoppel does not amount to an abandonment of the original defense and such a departure as to take plaintiffs by surprise, when the second answer is, in effect, an extended explanation of the particular manner in which the defendant came into possession of the premises, and the reasons for entering into the contract.

April, 1901.] Opinion of the Court—DUNBAR, J.

SAME — VERBAL LEASE — ESTOPPEL.

Where one of the owners of premises refers an applicant for a lease thereof to another of the owners, with the statement that the latter had the management of the property, and whatever arrangement was made with the latter would be satisfactory, and such applicant, relying upon the representation of both such owners as to the latter having full power and authority to make the lease, enters into a verbal lease of the premises with the latter, and expends money in their improvement, the owners are estopped to deny the validity of the lease.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Affirmed.

Preston & Bell, for appellants.

Lewis, Hardin & Albertson, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—On the 23d day of February, 1898, Amos Brown, since deceased, Annie M. Brown, his wife, James D. Lowman and Mary R. Lowman, his wife, the three last named being appellants in this action, were the owners of certain real estate in the city of Seattle, and leased the same to one Ida N. Cort for a period of five years. The lease was properly recorded, and the lessee went into possession and occupation of the demised premises, and held the same until the 1st day of March, 1898, when, with the written consent of the said lessors, she assigned the said lease to the American Amusement Company, a corporation. Said corporation remained in possession of the demised premises until the 29th day of August, 1898, when, in a certain action in which the American Amusement Company was defendant, one Merkel was appointed receiver and directed to take possession of all the assets of the corporation, including its interest in the demised premises. Said receiver immediately took possession of the premises, and, under the direction of the superior court of King

county, sold the interest in the same to E. P. Edsen. Edsen remained in constructive possession of the said premises until the commencement of the present action. There was quite an amount of money due under the terms of the lease for rent at the commencement of the action. During the time when the receiver was in possession, Kinnear & Brown, as alleged agents of the receiver, let the said premises to the defendant and respondent, Irvin Baruch, at a monthly rental of \$150, who occupied the premises until the commencement of this action, which was brought by A. L. Brown, Annie M. Brown, Lowman and wife. The defendant Edsen appeared and judgment was entered against him. The respondent, Baruch, appeared and contested the action, and judgment was rendered in his favor; the prayer of the complaint being for the restitution of the premises and for damages for detention.

It is alleged by the appellants that the court erred in permitting the respondent to file an amended answer; that, after the issues in the case had been made up in the court below and the cause placed upon the trial calendar, and shortly prior to the trial, the respondent applied for leave to file his so-called amended answer. It is claimed that in his original answer he had pleaded a surrender and cancellation of the outstanding unexpired lease held by the American Amusement Company as assignee of Ida N. Cort, and that thereupon the appellants had entered into an express agreement with him whereby he was to have possession of the premises described in the complaint for a period of one year at the rate of \$150 per month; that, in his amended answer, the respondent abandoned the defense pleaded in his original answer, and pleaded certain facts by way of an equitable estoppel. It is insisted that this is a departure which should not have been tolerated. It is said by the respondent in

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answer to this that the amended answer was filed by stipulation between the counsel for appellants and respondent, and a supplemental statement of facts is sent up to prove this assertion. But, while there was a stipulation that respondent should be allowed to file an amended answer, we presume the stipulation could not be construed to be a stipulation to file an amended answer that could not legally be filed. But, on the merits, an examination of these two separate defenses shows that there was no such a departure as would take the plaintiffs by surprise. The second answer is more of an elaboration of the first than it is a departure from its terms. It is, in effect, an extended explanation of the particular manner in which the defendant came into possession of the premises, and the reasons for entering into the contract which he did. The cases cited by the appellants are not in point. Much discretion is vested in the superior court in this particular, and, unless the appellate court can see that that discretion was abused, it will not be interfered with. In addition to this, there was no application for additional time to prepare for the defense to what are termed new allegations in the answer.

This, in our opinion, decides the remaining four assignments of error, viz: (2) That the court erred in permitting proof of facts tending to establish an estoppel *in pais*; (3) that the court erred in denying plaintiffs' motion for judgment made at the close of the case; (4) that the court erred in denying plaintiffs' motion for a new trial; (5) that the court erred in refusing to give plaintiffs' requested instructions; for, if the new answer was properly admitted, the court committed no error in permitting proof of facts tending to establish an estoppel *in pais*, even if it could be said that such a proof could not have been admitted under the first answer; and, if

this proof could properly be admitted, there was sufficient proof offered to sustain the court in denying plaintiffs' motion for judgment, to justify the instructions, and to sustain the judgment in favor of defendant. The instruction of the court on the vital question is as follows:

"If a person knowingly and voluntarily so conducts himself in relation to his business as to justify persons dealing with him in supposing and believing that a certain state of facts exists, and such persons do deal with him relying on that inference and belief, the person so conducting himself will not afterwards be permitted to deny that such state of facts did exist, to the prejudice of persons acting upon such belief. Therefore, if you find from a preponderance of the evidence that in May, 1899, the defendant Baruch applied to the plaintiff J. D. Lowman to rent the premises in question for a year or more, and that Mr. Lowman referred Baruch to the plaintiff A. L. Brown, stating that Brown had the management of the property and that whatever arrangement Baruch made with Brown would be satisfactory to Lowman, or if you find that Lowman in any form of words informed Baruch in substance that he might deal with Brown in leasing the property, then Baruch had the right to deal with Brown as the duly authorized agent of Lowman, even though Lowman might not in fact have given any authority to Brown. The law would not permit Lowman to now deny that Brown was his agent nor to deny that Brown had authority to act for Lowman in dealing with Baruch. And if you believe from the evidence that Baruch, relying on such statements of Lowman, informed A. L. Brown that he would not rent the property unless he could have possession of it for at least one year and that if he could have it for that time he would spend money in fitting it up and in getting ready to use the property as a place of public amusement, and if you further believe that Brown then stated or represented to Baruch that he (Brown) had authority to lease the place and that if Baruch would take it for one year his lease for that time would be valid and his possession undisturbed, and if you

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further believe that Baruch believed these statements and representations of Brown and relied on them, and relying on them, entered into a verbal agreement with Brown, whereby Brown agreed that Baruch should have the property for one year at \$150 per month and Baruch agreed to take it for that time at that rate, and that thereafter Baruch entered into possession of it and spent money in fitting up the place and preparing to use it as a place of public amusement, then you will find a verdict for defendant Baruch."

This, we think, was the proper statement of the law of estoppel, as applied to this case; and there was sufficient evidence, although that between Lowman and Baruch was somewhat conflicting, to sustain a finding of estoppel. It may be said here that there is no question arising between any of the lessees of the property and Baruch, but the contest is between Baruch and the owners of the property. There is also some question raised as to the community interest of Mrs. Lowman, but, from Lowman's testimony, it does not appear that his wife had any interest in the estate.

The judgment is affirmed.

REAVIS, C. J., and FULLERTON, MOUNT and ANDERS, JJ., concur.

[No. 3770. Decided April 13, 1901.]

ANTOINE ROBARE, *Respondent*, v. SEATTLE TRACTION COMPANY, *Appellant*.

MASTER AND SERVANT — ASSUMPTION OF RISK — APPARENT DANGERS — CONTRIBUTORY NEGLIGENCE.

An employee, injured by the the giving way of a tie of a trestle and being precipitated into the water beneath, is chargeable with contributory negligence, where defendant was engaged in repairing the trestle by drawing new piles, laying new stringers and ties, where necessary, and laying new rails; and, in or-

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der to drive new piles, the ties had been cut out at intervals, a fact which was known to all the workmen, and was a danger that was apparent and against which the foreman had frequently warned the workmen; and the injury to plaintiff was the result of his having stepped upon one of these shortened ties, while engaged in the work of pulling and gathering the spikes which held the rails to the ties.

Appeal from Superior Court, King County.—Hon. ORANGE JACOBS, Judge. Reversed.

Preston, Carr & Gilman, for appellant:

A structure which is being torn down, or re-built, or one which is in process of erection, and on which servants are engaged, is not a place to work within the rule requiring the master to furnish his servant with a reasonably safe place in which to work. *Allen v. Galveston, etc., Ry. Co.*, 37 S. W. 171; *McCann v. Kennedy*, 44 N. E. 1055; *Carlson v. Oregon Short Line, etc., Ry. Co.*, 28 Pac. 497; *Clark v. Liston*, 54 Ill. App. 578; *Moore v. Pennsylvania R. R. Co.*, 31 Atl. 734; *Carey v. Sellers*, 6 South. 813; *Armour v. Hahn*, 111 U. S. 313 (28 L. ed. 440); *Beique v. Hosmer*, 48 N. E. 338; *Richardson v. Anglo-American Provision Co.*, 72 Ill. App. 77; *Jennings v. Iron Bay Co.*, 49 N. W. 685; *Callan v. Bull*, 45 Pac. 1017; *McCone v. Gallagher*, 44 N. Y. Supp. 697; *Marsh v. Herman*, 50 N. W. 611; 2 Bailey, Personal Injuries, § 3024.

John E. Humphries and *Harrison Bostwick*, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is an appeal from a judgment of \$2,000 obtained for personal injuries. At the close of the plaintiff's testimony, motion for a non-suit was asked and refused. We think this motion should have been granted.

April, 1901.] Opinion of the Court—DUNBAR, J.

The defendant was operating a line of electric railway crossing Lake Union, in King county. The railway was constructed upon piles driven in the lake. Upon the piles were placed timbers known as stringers, and upon the stringers ties were placed, running at right angles to the course of the railway. The piles, stringers, and ties were secured by bolts and spikes. The boulevard across the lake consisted of a roadway for wagons and other vehicles, a footway for passengers, and two tracks of railway. That portion of the structure occupied by the railway had become old and dangerous, and needed repairing, and the undertaking was to repair without discontinuing traffic over the road. Holes were sawed in the ties, and the ties were cut out when necessary, leaving spaces of from two to three feet square, so that a pile driver could be operated for the purpose of driving other piles. These piles were driven in a row at right angles with the trestle, and between the old bents where the old piles had been. The pile driver was operated on a car, and drawn along on the track, and the piles were pulled up through these holes from the water below, and driven there. Then they were prepared and placed in proper position, and the old stringers, or those of them that were in good repair, were placed upon them, reinforced with new stringers alongside of the old ones, and new ties were placed upon top wherever the old ties were unfit for use. The old rails were moved off the structure, the spikes were pulled up, and new rails put in place of them. The work of rebuilding the structure was carried on by both day and night. The plaintiff was employed on a night force as a common laborer. He was working with a gang of eight men, and their duty was to pull and gather up the spikes which held the rails to the ties, and remove the old rails from the ties. They were followed by another gang, who

replaced the old ties with new ones, and laid new rails upon the ties. In the performance of his duty in pulling up and gathering the spikes the plaintiff stepped upon a tie, which gave way, and precipitated him through the trestle, by which he received the injuries complained of.

We think, upon the testimony of respondent and his witnesses, that he cannot recover. The exact manner in which the tie upon which the respondent stepped was severed from the rest of the structure is not disclosed by the testimony. The respondent's testimony is exceedingly meager. All that he says upon the subject is as follows:

"Q. What happened to you that night?

A. Well, sir, I was picking up spikes at one o'clock, after we ate our lunch; probably had been working two or three minutes at the time, and as I walked on to one of the short ties, the short tie gave way and let me down and struck my elbow first and my side.

Q. Which elbow was struck?

A. This one right here. And it struck my side, knocked the breath out of me; I could not talk for a long time. If it hadn't been that my elbow struck first, it would have killed me dead.

Q. Did you know anything about there being a short tie there before you fell?

A. No, I did not.

Q. Did you know anything about that tie not being supported or braced?

A. No, sir, I did not."

Then the witness passes to a consideration of his hurts. Another witness testifies, when asked how wide a space had been cut out of the center of this tie, and having stated that the tie had been cut in the center:

"I could not tell you that, because I didn't see the tie before he fell in, and it might have been right together, and there might have been an inch or two. I seen the other end of the tie sticking half way across, and the tie

that he stepped on went into the lake, and we did not look for that.”

While there is a great deal of testimony, this is the substance of the testimony in relation to the condition of the tie upon which the respondent stepped. He must necessarily have known that the tearing down and building up of an old structure of this kind was a dangerous occupation. While it was in the night, the testimony shows that it was very light, clusters of electric lights being carried along by the workmen to aid them in seeing the work. It is also in testimony, by witnesses McGuire, Lindsay, Shenk, Morrison, and Woolery, the first two of whom were plaintiff's witnesses, that the foreman constantly warned the men of their danger, and notified them to look out; and, while the respondent testifies that he did not hear the warning, it seems to us, from the testimony of all the other witnesses, that he ought to have heard it. In addition to this, he knew of the general condition of the road; knew that these ties had been sawed off at stated intervals for the purpose of driving these piles; and it was his duty to be careful under such conditions, whether he had heard the warning to be careful or not. The other men who were with him knew of the condition of this road, and the respondent's own witnesses testified that, if a person were paying attention, he could have seen the condition of things. They also testified that the gang in which the appellant was working was not in any way hurried by the overseer; that he was not driving the men at all, or urging them to hurry; and that it was plainly a dangerous place to work. From the testimony of the respondent alone we are forced to the conclusion that he did not exhibit that care and watchfulness which he should have done under the circumstances, that the danger was apparent, and that the company was, therefore, not responsible for the damages which ensued.

The judgment will be reversed, with instructions to dismiss the case.

REAVIS, C. J., and FULLERTON, ANDERS, and MOUNT, JJ., concur.

[No. 3777. Decided April 13, 1901.]

E. A. DE MERS, *Appellant*, v. SANDY SPIT FISH COMPANY
et al., *Respondents*.

APPEAL—DISMISSAL—RESUMPTION OF JURISDICTION BY TRIAL COURT.

Where a motion by appellants to dismiss their own appeal was filed on June 26th, with respondent's permission to have the motion acted on at once indorsed thereon, and notice was served on the parties that the motion was granted, though a formal dismissal of the appeal was not made by the supreme court until September 14th, the trial court again acquired jurisdiction of the cause so as to make its orders entered therein on the 30th of June legal.

FISHING SITE — ABANDONMENT — RELOCATION.

The failure of a locator of a fishing site to construct a trap thereon during the fishing season covered by his license, under Laws 1897, p. 214, § 7, does not constitute such an abandonment of the location as to disqualify the licensee for relocating the same for the next fishing season.

Appeal from Superior Court, Whatcom County.—Hon. HIRAM E. HADLEY, Judge. Reversed.

Dorr & Hadley, for appellant.

Kerr & McCord, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—This is a contest between two rival fishing companies. The plaintiff alleged that he had an established fishing trap in the waters of Puget Sound, and that the defendants, undertaking to make a location for a fishing trap, had in divers and sundry ways encroached upon

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his rights, and had driven piles for the purpose of constructing a salmon pound net or fish trap, in such a manner as to absolutely shut off the run of salmon to plaintiff's location, and so as to close up and destroy the end passage which is required by the laws of the state of Washington to be left between the salmon pound nets or fish nets. The encroachments and alleged violations were set out with particularity, but it is not necessary to repeat them here. Answer was made, alleging the licenses and locations by the defendants, and encroachment on the part of the plaintiff. Injunctive relief was asked by the plaintiff. Upon the trial a temporary injunction was granted in favor of the plaintiff, and against the defendants. From this order of injunction an appeal was taken to this court, and a supersedeas bond was given. This injunction was issued on July 12, 1899. The appeal was dismissed in this court on September 14, 1900. But on June 26th a motion was filed here by the appellants in that case to dismiss their appeal. This motion had been served upon the attorneys for the respondent, who was the plaintiff in the action below, and he indorsed thereon permission to have the motion acted upon at once. Nothing was done with the injunction in this case until June 18, 1900, when a cross complaint was filed by the defendants, the respondents here, and a temporary injunction prayed for. On June 21, 1900, a motion was made by the defendants to vacate the temporary injunction which had been granted on July 12th. On June 27th, a temporary injunction in favor of the respondents (defendants below) was asked for. On June 30th the temporary injunction issued on July 12, 1899, was vacated, and on the same day a temporary injunction was issued against the plaintiff below and in favor of the defendants. The vacation of the injunction against the defendants, and the issuing of the injunction against

the plaintiff, were based upon certain affidavits which were presented, setting forth the fact that the plaintiff had abandoned his claim by reason of not having erected his traps during the license season, the court having acted upon the theory, which was then generally accepted by the bar of the state, that, under the provision of the statute, if the locator fails to construct his appliance during the fishing season covered by his licence, such location shall be deemed abandoned. Since the issuing of this injunction, however, this court in the case of *Legoe v. Chicago Fishing Co.*, ante, p. 175, decided March 7, 1901, has placed a different construction upon that statute, and has held that such abandonment or failure to construct a trap does not disqualify and preclude the locator from relocating the same, if he were otherwise qualified. It is contended by the appellant that the court had no jurisdiction to act in the premises, for the reason that the case was on appeal to this court. We are inclined to think from the record, however, that notice had been given of the dismissal of the cause here before the order of the court made on the 30th of June, 1900, although the cause had not been formally dismissed until the September following.

But, conceding the jurisdiction of the court, we do not think there is sufficient testimony in the record to warrant the granting of the injunction in favor of the defendants. Outside of the question of abandonment, there was no testimony before the court at the time the last injunction was granted which was not before it at the time of the granting of the first injunction. We are inclined to think that the testimony, although somewhat conflicting, justified the court in issuing the injunction against the respondents, and it therefore necessarily follows that it is not sufficient to warrant the granting of an injunction against the appellant, and the latter injunction having been granted by the

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court, not upon any additional evidence, but upon a mistaken view of the law, the cause will be reversed, with instructions to the lower court to vacate the injunction appealed from.

REAVIS, C. J., and FULLERTON, ANDERS, and MOUNT, JJ., concur.

[No. 3791. Decided April 13, 1901.]

UNION MINING AND MILLING COMPANY, *Appellant*, v. R.
U. LEITCH *et al.*, *Respondents*.

MINES AND MINERALS — LOCATION OF CLAIMS — MARKING BOUNDARIES — REASONABLE TIME.

Under U. S. Rev. St. §§ 2320, 2324, which provide that "no location for mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," and that "the location must be distinctly marked on the ground so that its boundaries may be readily traced," the locator of a mining claim is entitled to a reasonable time in which to mark the boundaries of his claim after its discovery.

SAME.

Where the locators of a mining claim posted notices showing the direction and extent of their claim, but did not mark the boundaries on the ground until eight days thereafter, during which interval conflicting claims were filed by other locators who were aware of the prior location, the failure to mark the boundaries of the claim on the ground for eight days after discovery was not an unreasonable time, when the locators were compelled by lack of provisions to go to the nearest station where a supply could be procured, and did so, in the belief that they had a reasonable time to complete their location of their claim, one corner of which was almost inaccessible, owing to the roughness of the country.

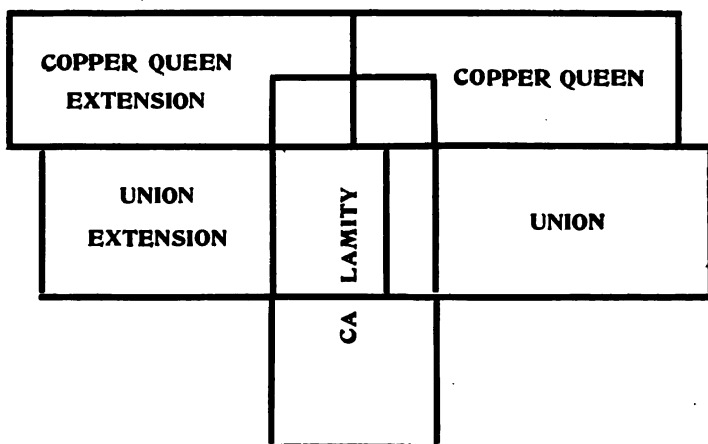
Appeal from Superior Court, Whatcom County.—Hon. HIRAM E. HADLEY, Judge. Affirmed.

Jeremiah Neterer and Denny & Hulbert, for appellant.

Elmon Scott, for respondents.

The opinion of the court was delivered by

MOUNT, J.—The facts in this case are briefly as follows: The Calamity quartz claim was located in an unorganized mining district in Whatcom county, Washington, on August 19, 1897, by the defendants, who, at the time of the discovery, erected a monument at the point of discovery on the south end of the claim and posted thereon a notice claiming 1,500 feet in a northerly direction from the post, 300 feet west, and the same distance east. The said locators did not mark the boundaries on said claim until the 27th day of August. On the 22d of the same month the plaintiff's grantors located four claims known as the "Union," the "Union Extension," the "Copper Queen," and the "Copper Queen Extension," so as to overlap the north end of the Calamity, as shown by the following diagram:



At the time of the location of these latter four claims, the locators knew of the location of the Calamity, but did not know the exact location of the lines thereof. The whole party, consisting of some sixteen men, thirteen of

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whom were the locators of this group, and the other three locators of the Calamity, had traveled into the district together, but each party located independently of the other. After the defendants had erected the monument and posted the notice of location on the Calamity claim, in the evening of Sunday, the 19th day of August, on the next day they located some nine other claims in the same vicinity in the same way. On the following day,—Tuesday,—all three left the locations thus initiated and did not return until the 27th, when the boundaries of the Calamity claim were marked on the ground. The excuse given for this delay is that their provisions ran out, and they were compelled to go to the nearest supply station for provisions, which required the intervening time. On the 22d plaintiff's grantors located the group of four claims above named without the knowledge of the locators of the Calamity. It is conceded that the annual assessment work has been done since location by each of the parties hereto on all of said claims. In the subsequent workings the interests of the parties conflicted, and suit was brought by plaintiff to enjoin defendants from interfering with the minerals and work of plaintiff on the group of four claims named.

Several questions of minor importance are argued in the briefs, but the question decisive of the case, and upon which all the others depend, is, did defendants, after discovery, have a reasonable time in which to mark the boundaries of the Calamity claim, so that the same might be readily traced upon the ground? And, if so, was eight days, under the circumstances, a reasonable time? At the time of the discovery in question, there was no law of the state defining the time within which the boundaries should be marked, or how they should be marked upon the ground, nor was there any local rule or custom in the dis-

strict. The decision of this question therefore depends upon the construction of the United States statutes governing the subject. Section 2320, U. S. Rev. St., provides that

“No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.”

Section 2324, Id., provides that

“The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries may be readily traced. . . .”

No exact time is limited within which the marking shall be done. Appellant, in its brief, relies upon the case of *Newbill v. Thurston*, 65 Cal. 419 (4 Pac. 409), and *Patterson v. Tarbell*, 26 Ore. 29 (37 Pac. 76), which hold that the discoverer must immediately locate his claim by distinctly marking the same on the ground so that the boundaries may be readily traced; and in default thereof a subsequent location, peaceably made, will prevail against a prior discoverer. This construction of the United States statutes is a strict construction, and can be correct only upon the theory that congress intended the marking to be done without any delay. If this construction is correct, viz., that congress intended the marking to be done immediately, then neither the miners nor the states could, by any rule or law, extend the time for the marking, because such rule or law would be in conflict with the United States statute. It is generally conceded that the legislature of the state may fix a time for marking the boundaries after discovery, and since the decisions named above

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every mining state, with the possible exception of the state of Oregon, has passed a law fixing the time within which such marking shall be done. The decisions above referred to overlook the general rule that, where no time is limited for the doing of an act, a reasonable time therefor is impliedly given. Mr. Lindley, in his work on Mines (at § 339, vol. 1), says:

“As so much depends upon the locator determining the position of his vein in the earth and the course of its apex, and the consequences of a failure to make his location and establish his end lines, as the law contemplates, being accompanied with such serious results, it would seem that congress never intended to compel the discoverer to immediately proceed at his peril with the marking of his boundaries. The posting of a preliminary notice, though not specially authorized by statute, should be sufficient to protect the discoverer for a reasonable time, at least, within which he might determine approximately the all-important facts upon which the value of his property to a great degree depends.”

And (at §372):

“In the absence of state legislation or district regulation, it has been held, in California, that while a party in actual possession, proceeding with diligence to mark his boundaries, would be protected as against a stranger attempting to relocate, yet, strictly speaking, no time is allowed to the locator to complete his location by marking it on the surface. This view is also adopted by the supreme court of Oregon. But, as heretofore indicated, the circuit court of appeals for the ninth circuit, upon the same state of facts presented in one of the California cases, declines to accept the doctrine of the California courts, but follows the rule announced by the supreme courts of Nevada and Idaho, and the manifest intent of the law as suggested by the supreme court of the United States and by the courts of last resort in Colorado and South Dakota. It is unnecessary to here repeat what we have said on this subject in a preceding section. For the reasons therein

suggested, we are of the opinion that the rule announced in California is opposed to both the spirit of the law and the weight of authority;" citing *Doe v. Waterloo M. Co.*, 70 Fed. 455; *Gleeson v. Martin White M. Co.*, 13 Nev. 442; *Burke v. McDonald*, 2 Idaho, 646 (33 Pac. 49); *Erhardt v. Boaro*, 113 U. S. 527 (5 Sup. Ct. 560); *Murley v. Ennis*, 2 Colo. 300; *Patterson v. Hitchcock*, 3 Colo. 533; *Marshall v. Harney Peak Tin M. Co.*, 1 S. Dak. 350 (47 N. W. 290).

The authorities cited bear out the conclusions of the learned author, and, in our opinion, his conclusions are correct. As to what is a reasonable time is a question of law, and depends upon the circumstances of each particular case. Counsel argue that, because defendants located nine other claims upon the following day, they could and should have completed the marking of the boundaries of the Calamity immediately. This fact, while it may be considered as an indication of abandonment or want of good faith, is not conclusive of either. The defendants might have rested on that day, or they might have started for supplies, as they did on the following day. The result, in any event, would have been the same, for the overlapping claims were located on the 21st, 22d, or 23d, without the knowledge of defendants, and after knowledge on the part of the plaintiff's grantors that the Calamity had been located, and after they had read the description thereof on the notice. The law held the defendants to reasonable diligence. The country where the Calamity was located was rough, and at one corner inaccessible. The defendants, thinking they had a reasonable time to complete their location, being without provisions, were at liberty to devote a short time to other necessities. Good faith demanded of plaintiff's grantors that they should make inquiries of the defendants whether they intended to follow up their location or abandon the same, or at least

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wait a few days before locating an adverse claim thereon. We are of the opinion that eight days, under the circumstances, was not an unreasonable time within which defendants should mark the boundaries of the Calamity claim on the ground, and that defendants' location was therefore prior in time to that of plaintiff's grantors.

We have carefully examined the record in the case, and conclude that the facts as regards the existence of mineral and discovery thereof prior to the location and the recorded notice and amendment thereof are in accord with the findings of the lower court.

The judgment will therefore be affirmed.

REAVIS, C. J., and FULLERTON and DUNBAR, JJ., concur.

[No. 3818. Decided April 13, 1901.]

CHARLES McNAMEE, *Respondent*, v. CITY OF TACOMA,
Appellant.

STREET IMPROVEMENTS — REASSESSMENT — OBJECTIONS — ESTOPPEL.

Where a city council has regularly reassessed abutting property for street improvements, and has given notice to property owners to file objections to such assessment, within a certain time, as required by statute, an owner who fails to so object cannot afterwards dispute the validity of the assessment in an action to remove the cloud on his title created by a sale of the property upon foreclosure of the assessment lien.

SAME — CONSTITUTIONALITY OF STATUTE.

Laws 1893, p. 226, providing for the re-assessment of property "with reference to the benefits received," where the original assessment for street improvement has been declared invalid, complies with the doctrine that assessments for public improvements must be tested by the benefits conferred, and hence is not unconstitutional on the ground of authorizing the taking, under the guise of taxation, of private property for public use without compensation.

24	591
25	313
24	591
131	163
24	591
34	659
35	373

Appeal from Superior Court, Pierce County.—Hon. THOMAS CARROLL, Judge. Reversed. .

William P. Reynolds and *Emmett N. Parker*, for appellant.

Stiles & Nash, for respondent:

A street improvement assessment levied upon the basis of the frontage of abutting property is void because it violates the constitution of the United States. *Village of Norwood v. Baker*, 172 U. S. 269 (43 L. ed. 443); *Loeb v. Trustees of Columbia Township*, 91 Fed. 37; *Fay v. Springfield*, 94 Fed. 409; *Charles v. Marion*, 98 Fed. 166; *Lyon v. Town of Tonawanda*, 98 Fed. 361; *Cowley v. Spokane*, 99 Fed. 842; *Charles v. Marion*, 100 Fed. 538; *Parker v. Detroit*, 103 Fed. 357; *Hutcheson v. Storie*, 51 S. W. 848 (45 L. R. A. 289, 71 Am. St. Rep. 884); *Walsh v. Barron*, 55 N. E. 164. These cases cover almost every possible phase of the question, and answer every possible argument against the application of *Village of Norwood v. Baker* to such cases; and they include cases of attempted estoppel, at all stages of the proceedings.

The opinion of the court was delivered by

DUNBAR, J.—The plaintiff is the owner of certain lots in the city of Tacoma. In the year 1892 the city improved the street upon which the lots fronted, and assessed the lots in a certain amount. Thereafter, in October, 1894, said assessment was set aside and annulled. In July, 1896, a new assessment was made under a proper ordinance, and in September, 1896, the commissioner of public works of the city of Tacoma,—he being the proper authority and officer so to do,—made and certified to the city council a reassessment roll, under the authority of ordinance No. 1004 and the law of 1893 (Laws 1893, p. 226), to the

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effect that, having examined the property and said improvements to determine how much each separate tract was benefited thereby, he found that each of said lots, pieces, or parcels of land described in the assessment roll was benefited by the said improvement in the amount set opposite said tract in the column marked "Amount of reassessment in the within roll," and found that the actual cost of said improvements was equitably apportioned to the property described according to the benefits received by each lot. Thereafter due notice of the assessment was given and of the time when objections thereto would be heard by the city council. No objections having been made and the assessment becoming delinquent, the lots in question were duly sold and the city of Tacoma bought them in. All the steps from the assessment to the sale were substantially complied with. This is an action brought by the owner against the city to remove a cloud from the title, he claiming that the assessment was illegally made. The court found that the labor, material, and money expended upon said improvement were of no benefit whatever to the property abutting thereon, and that the assessment was made without reference to benefits, but was made on a front foot basis; and from such finding concluded that the provisions of the charter of the city of Tacoma violated the constitution of the United States, for the reasons that the same did not recognize a benefit to such lots and parcels as a basis of such assessment; that the act of the legislature of the state of Washington approved March 9, 1893, providing for a reassessment of the cost of local improvements, was unconstitutional for the same reason; that the reassessment of plaintiff's lots was null and void; that the plaintiff was not estopped from maintaining this suit by his failure to file objections

to said reassessment; that he was entitled to the relief prayed for. Judgment was entered accordingly.

If the statement in this case had been a little more elaborate, it would have been exactly the statement made by this court in the case of *Annie Wright Seminary v. Tacoma*, 23 Wash. 109 (62 Pac. 444), with the exception that in this case the action is to remove a cloud, and in that case it was to enjoin the collection of a tax. We do not care to again discuss the questions which were discussed in that case. There it was held that, where a common council has regularly reassessed property for street improvements, and has given notice to property owners to file objections to such assessment within a certain time, as required by statute, an owner who fails to so object cannot afterwards dispute the validity of the assessment in an action to foreclose the assessment lien. So that, under that decision, which we now approve, the finding of the court in relation to the manner in which the assessment was made is utterly immaterial. This court has often said,—and the cases are cited and quoted from in the *Annie Wright Seminary Case*, *supra*,—that, the law having provided a tribunal to determine those questions, where the parties had had notice of the time when such questions would be determined and had not appeared, the decision of the tribunal as to them was conclusive. It will be remembered that this is a collateral attack upon the assessment, and not an appeal, as was the case in many of the cases cited by the respondent.

So that there is only one additional question in this case, and that is the constitutionality of the act of 1893. This act was also attacked by counsel for the respondent in the case of *Annie Wright Seminary v. Tacoma*, *supra*, but probably not quite so elaborately as by counsel for the respondent in this case. It is also insisted by counsel for

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respondent here that the court should place a different construction upon the statute of 1893, since the publication of the case of *Village of Norwood v. Baker*, 172 U. S. 269 (19 Sup. Ct. 187). *Village of Norwood v. Baker* was also cited by counsel for respondent in the *Annie Wright Seminary Case*, and we are not able to see that the announcement of the rule in *Village of Norwood v. Baker* can or ought to in any way affect the judgment of this court in relation to the constitutionality of the act of 1893. The *Norwood Case* only announces the doctrine that the assessment must be tested by the benefits, and that the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. It is not a new doctrine which is announced, as is shown by the authorities brought to its support by the writer of the opinion, and the principle was recognized by this court when it upheld the constitutionality of the law of 1893. But it is contended by counsel that the law of 1893 would not bear the construction placed upon it by this court, and that it is not really a statute providing for assessment according to benefits. This court has said that the statute meant assessment by benefits, and that practically makes the statute mean it, and the construction of the statute placed upon it by this court will be followed by the supreme court of the United States. The statute in no way invaded the constitutional right of the owner of property in municipalities, and, the assessment having been made in conformity with the statute and of legal municipal laws, the judgment will be reversed, and the cause dismissed.

REAVIS, C. J., and FULLERTON, MOUNT and ANDERS, JJ., concur.

[No. 3725. Decided April 15, 1901.]

JOSEPH BLUMAUER *et al.*, Appellants, v. RACHEL L.
CLOCK *et al.*, Respondents.

CHattel Mortgages — Priorities — Creditors — Incumbrances.

Under Bal. Code, § 4558, which provides that "a mortgage of personal property is void as against creditors of the mortgagor, or subsequent purchasers and incumbrances of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and it is acknowledged and recorded," one performing labor for the mortgagor with actual knowledge of the existence of an unrecorded chattel mortgage is a creditor and entitled to priority over the mortgagee, even though he may have filed a subsequent lien against the property under the provisions of the employee's act of 1897 (Laws 1897, p. 55), since the fact that lienors, who at one time were creditors, have seen fit to accept the benefit of the law in relation to the enforcement of their claims does not take them out of the category of creditors and place them in that of incumbrancers; the statute contemplating by the term "incumbrancers," those who acquire that position by means of contractual relations and not by operation of law.

EMPLOYEES' LIENS — CLAIM FOR LABOR OF OTHERS.

One who has a contract with an employer to do certain labor for him is not deprived of the right of lien given by Laws 1897, p. 55, to employees, from the fact that he hired help to assist in the performance of the labor, paying therefor at his own expense, when such hired labor in no wise changed the contract price or the relations between the employer and the lienor.

PARTIES — INFANCY — WAIVER OF OBJECTION.

The objection that parties to an action are minors, who appear without guardians *ad litem*, cannot be raised by the adverse party after pleading to the merits.

Appeal from Superior Court, Thurston County.—Hon.
OLIVER V. LINN, Judge. Affirmed.

Troy & Falknor, for appellants.

April, 1901.] Opinion of the Court—DUNBAR, J.

John R. Mitchell, Phil. Skillman and J. W. Robinson,
for respondents.

The opinion of the court was delivered by

DUNBAR, J.—This is an action on the part of the appellants to foreclose a mortgage upon both real and personal property. The appeal herein involves the rights of appellants and respondents to the personal property described in appellants' mortgage. The personal property is described as the building used as a shingle mill, together with the machinery specifically described, the same being situate on leased land in the town of Bucoda, Thurston county, state of Washington. The appellants' mortgage was executed by Rachel L. Clock and others, on the 14th day of November, 1896, for the sum of \$2,557.24, and there is now due and owing upon the same \$2,269.94, with interest and attorney's fees. The mortgage was recorded in the auditor's office of Thurston county upon the 18th day of November, 1896, but the mortgage did not contain the affidavit of good faith, and was recorded as a real estate mortgage. The respondents, excepting the mortgagors, were employed in said mill described in the mortgage, which mill was being operated by a firm known as Clock & Sanford, and they performed work and labor and furnished material to said Clock & Sanford in the operation of said mill, for which they filed logger's liens upon the lumber and shingles at the mill, and also what are known as "employees' liens" upon said mill, under the law of 1897. These respondents were brought into the action. To the answer of respondent lienors the appellants replied, alleging actual knowledge of the appellants' mortgage. The court found that certain of the respondents, towit: J. M. and M. J. Davies, Henry Richards, Ed. Enderland (who assigned his claim to Henry

Richards), Peter Anderson, Louis Hagoes, Sam. Southerland, A. Perry, Tony Cales, and Charles Whalen, and each of them, had, at and prior to the doing of the work for which they claimed their liens, actual knowledge and notice of appellants' mortgage, but also found that all of the respondents' claims were superior to those of the appellants, the mortgagees.

The first assignment of error is that the court erred in holding the employee's act of 1897 constitutional. This question is eliminated from the case by the opinion of this court in *Fitch v. Applegate*, ante, p. 25 (64 Pac. 147).

It is also alleged that the court erred in its conclusion of law that the respondents' liens were superior upon the property, after finding that the respondents had actual knowledge of appellants' unrecorded mortgage. The statute which is under construction here is § 4558, Bal. Code, which is as follows:

"A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchaser, and incumbrances of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property."

There has been a controversy in this and other states in relation to the construction of this statute, but this court, in *Hinchman v. Point Defiance Ry. Co.*, 14 Wash. 349 (44 Pac. 867), placed a construction upon the statute which it has since followed. It was there said:

"We think the true interpretation to be given the section requires the transposition of the comma appearing after the word 'purchasers,' as found in said section, by placing it after the word 'mortgagor,' making the section read as follows: 'A mortgage of personal property is void as against creditors of the mortgagor, or subsequent pur-

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chasers and incumbrances of the property for value and in good faith.' . . . Manifestly," said the court, "there are three classes of persons whose rights are defined by this section. They are, (1) creditors of the mortgagor; (2) subsequent purchasers; and (3) parties in whose favor subsequent incumbrances of the property are made. As to the first class—creditors,—the unrecorded mortgage is absolutely void. It is void, also, as to the two latter classes when they deal with the mortgaged property for value and in good faith. Subsequent purchasers and parties taking subsequent incumbrances upon the property are thus placed upon the same footing, and in all reasons why should they not be?"

It is insisted by the appellants that the lienors are subsequent incumbrancers; that they are not creditors of the mortgagor; and that their actual knowledge of the existence of the mortgage exempts them from the benefit of the section; and the above case is quoted in support of that contention. But we are inclined to think that in the third classification, viz., parties in whose favor subsequent incumbrances of the property are made, the court did not have reference to parties in whose favor any incumbrances were made by operation of law, but to parties who took an incumbrance by virtue of a contract with the owner of the property, as a subsequent mortgagee, and incumbrances of that character. This view is sustained by the decision of this court in *Willamette Casket Co. v. Cross Undertaking Co.*, 12 Wash. 190 (40 Pac. 729), where, after quoting the statute, it was said:

"If the language used be given its ordinary significance, it would seem to fully warrant such contention. It is claimed, however, by the respondent that only such creditors are protected by the provisions of this section as before the time of the recording of the mortgage have obtained some specific lien upon the property. But such construction would do violence to the language used. The statute makes no distinction as to the creditors who are

to be protected, and we see no good reason for holding that one class rather than another was intended. One is as much a creditor before his claim has been made a specific lien upon certain property as after, and for that reason an unsecured creditor is as well described by the language of the section as one who had procured a specific lien as security for his claim. The intention of the legislature was to protect those who should give credit upon the faith of property owned by one to whom it was extended, and to give force to such intention the term 'creditors', as used in the act, must be held to cover all classes of creditors."

It is generally held that, where the statute does not restrict the word "creditor", the courts will not limit its application. A creditor and an incumbrancer may stand in a dual capacity; for an incumbrancer must, at least, be a creditor, although a creditor need not necessarily be an incumbrancer. It seems to us that the more reasonable and just construction of the law would be to construe the term "creditor" with reference to the inception of the obligation of the debtor, rather than to conditions which might afterwards arise. For instance, if the lienors in this case had not seen fit to file their liens, but had relied upon their employer for compensation, they would unquestionably have been creditors. Because they afterwards took advantage of the lien laws, the relative position to the employer ought not to be held to have been changed. It has even been held in *Dempsey v. Pforzheimer*, 86 Mich. 652 (49 N. W. 465, 13 L. R. A. 388), under a statute like ours, that where a creditor, who was entitled to the benefit of the statute, afterwards entered into a voluntary agreement with his debtor by which he took a mortgage upon the property that had been before that mortgaged, but which had not been properly recorded, his relation as creditor had not been changed. The syllabus of the case is that "a creditor who has the right to secure

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a lien by legal process superior to that of a chattel mortgage then on file, because his debt was contracted while the mortgage was withheld from record, may obtain a like lien by the execution to him by the debtor of a chattel mortgage to secure the same indebtedness after the filing of the first mortgage." In that case, Harris & Karpp, partners in the jewelry business, borrowed \$2,000 of one Borgess, and gave a chattel mortgage upon the goods to secure such indebtedness. This mortgage was not properly recorded. Afterwards a mortgage was given to respondent for a sum of money upon the same goods, the first mortgage not having been properly recorded. After holding that the mortgage was void for want of filing, as against the original indebtedness, the court said:

"If the defendants, before taking their mortgage, and after the filing of the Borgess mortgage, had proceeded against the property so mortgaged, and obtained by any process of law a lien upon it, or had they obtained judgment upon their claim, and issued execution, and levied on it, there can be no doubt but such lien or levy would have been good as against the Borgess mortgage. But it is claimed on behalf of plaintiff that because defendants took a mortgage to secure the indebtedness to them after the Borgess mortgage was put on file, and therefore had notice of it, they cannot now claim the benefit of the rule adopted by this court as shown above, and that they have no standing under the statute upon which the rule is founded. It is contended that, to avail themselves of the statute, the defendants, at the time of seizing the goods in question, must have the standing either of 'creditors of the mortgagors,' or of 'subsequent purchasers or mortgagees in good faith'; that they cannot claim as subsequent mortgagees in good faith, because they took their mortgage with full notice of the Borgess mortgage, which had then been on record for four days; and that the benefit of the statute cannot be invoked in favor of creditors, except by those who have a lien by process of law upon the property

in question; . . . But we can see no difference between a lien obtained by process and one gotten by consent of the owner through a chattel mortgage. If the defendants were entitled, as they undoubtedly were, to obtain a lien upon this property by legal process, and to hold it to the amount of such lien against the mortgage of Borgess, because the debt they were seeking to collect was contracted while this mortgage was withheld from record, we can see no reason in principle why they cannot hold the property under a lien obtained by chattel mortgage to secure the same indebtedness."

And so, in this case, the fact that the lienors, who at one time were creditors, have seen fit to accept the benefit of the law in relation to the collection of their claims, does not take them out of the category of creditors and place them in that of incumbrancers. If they should reduce their claims to a judgment and issue execution, and levy upon property of their employer, they would have an incumbrance upon the property; but it would not be argued for a moment that they would lose any rights by reason of the operation of the law in this respect, and it is by reason of the operation of the lien laws, and not by any contractual relations, that they have an incumbrance or lien upon the property of the employer. It cannot even be said that they originally intended to take advantage of the lien laws. Ordinarily, when a man works for another he expects to be paid for his labor without the expense, vexation, and delay attending the foreclosure of a lien, and he avails himself of the lien law as a last resort, if he avails himself of it at all. The lienor stands in an entirely different position from a person who originally contracts with reference to the security which he takes, and who would have no contractual relations with the debtor excepting for the security.

It is also insisted that these lienors are not creditors

of the mortgagor, for the reason that the mortgage was given, in the first place, by Rachel Clock and others, and that one Sanford has since obtained an interest in the operation of the mill. But we do not think this contention can be sustained in the face of the record. The finding of fact is to the effect that J. B. Clock, who was one of the original joint owners of the shingle mill property, at about the time he formed a partnership with Sanford for the purpose of operating the mill purchased all the interests of his joint owners in and to the said shingle mill property, and has all the time, during which the labor was performed, been the absolute owner of the mill property. It follows that Sanford has no interest that would in any way affect the lien on Clock's property.

The objection is raised that the lien claim of Egbert Martin comprises work that was done by his brother, and also included the claim of some hired men; and it is insisted that this claim cannot be sustained, under the doctrine announced in *Dexter Horton & Co. v. Sparkman*, 2 Wash. 165 (25 Pac. 1070), and *Campbell v. Sterling Mfg. Co.*, 11 Wash. 204 (39 Pac. 451). The court made the following finding in relation to Martin's lien:

"That all of said shingle bolts mentioned were cut by said Egbert Martin and his brother ——— Martin, equally and jointly, under agreement with said Clock & Sanford, and they were together entitled to the whole amount that was mentioned as due in said lien of Egbert Martin, but that said Egbert Martin, by mistake and honest error, and not intending to defraud any one, liened or included in his lien the whole amount, instead of the half of said amount, and that his lien should have been only for the amount of \$73.52; that in cutting said bolts on the ranch of Davis, as aforesaid, said Egbert Martin and his brother employed at their own expense and paid for assistance of four others to the amount of \$64.25, altogether, in the cutting of all said bolts, without any con-

tract on the part of said hired help to and with said Clock & Sanford, and the same did not in any manner change or modify the agreed price per cord for cutting of said bolts, namely 85 cents per cord."

The lien was cut down to the extent of the amount claimed and earned by the brother of Egbert Martin. It is true that in some of the earlier cases of this court, notably *Dexter Horton & Co. v. Sparkman*, *supra*, it was held that the lien given by statute was personal to the laborer, and when the laborer combined with his own claim the one assigned by another laborer he lost all right to take benefit of the foreclosure. But in that case the lien assigned was a distinct lien, and the lienor claimed for both balances in the gross sum. In addition to the fact that the court of later years has been inclined to construe the lien laws more liberally in favor of lienors, in this case the lienor, Martin, had a contract for hauling all these shingles, and in no event could the labor employed change the contract price or change the relations between the employer and the lienor, and the case falls within the rule announced by this court in *Hopkins v. Jamieson-Dixon Mill Co.*, 11 Wash. 308 (39 Pac. 815), where was sustained a lien that was partly for labor furnished as distinguished from labor performed.

The lien of Charles Whalen falls squarely within the rule announced above, and the same may be said of the liens of James M. and Morgan J. Davies; the finding being that a certain sum was due for labor under the contract contained in the lien.

As to the objection to liens of Ray Clock and Tony Cales, on the grounds that they were minors, it is sufficient to say that the objection, not being raised until the trial of the case, came too late; and "when an infant, without the intervention of a guardian or next friend,

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Syllabus.

undertakes to prosecute his suit in his own name, the debtor has a right to object to his recovery, because the judgment, like the contract, may be repudiated, or affirmed and enforced at the election of the infant, if rendered before his majority. . . . But such objection must be interposed in apt time" by plea in abatement or by answer "before the trial on the merits, and if not so pleaded it will be considered as waived." *Hicks v. Beam*, 112 N. C. 642 (17 S. E. 490, 34 Am. St. Rep. 521).

"After pleading to the merits the objection cannot be raised, for the defendant is deemed to have thereby admitted that the plaintiff is *rectus in curia*." 14 Enc. Pl. & Pr., 1019, and cases cited.

The judgment is in all respects affirmed.

REAVIS, C. J., and FULLERTON, ANDERS, MOUNT and HADLEY, JJ., concur.

WHITE, J. If called upon to interpret, as an original construction, § 4558, Bal. Code, I could not concur in this opinion. Inasmuch, however, as this court has held that a mortgage of personal property, unless executed and recorded in the manner provided by law, is void, as against creditors, with or without notice, I concur; for I think the mere fact that one avails himself of a lien given to him by law does not constitute him a mere incumbrance.

[No. 3859. Decided April 15, 1901.]

THE STATE OF WASHINGTON *on the Relation of J. W.*
Wallace v. SUPERIOR COURT OF KING COUNTY.

MANDAMUS — JURISDICTION OF SUPREME COURT — AMOUNT IN CONTROVERSY.

Mandamus will not lie to compel the superior court to try an action where the amount involved is less than \$200, since the constitutional provision giving the supreme court jurisdiction

24	605
124	725
24	605
31	99
24	605
39	199
24	605
140	270
640	984

in mandamus as to state officers must be construed in connection with the provision in the same section prohibiting the appellate jurisdiction of the supreme court, where the amount in controversy is less than \$200.

Original Application for Mandamus.

Bogle & Richardson (*Vance & Mitchell*, of counsel),
for relator.

George E. Morris, for respondent.

PER CURIAM. This is an application in mandamus. Petitioner seeks to compel the superior court of King county to take jurisdiction of a certain cause and hear it on its merits. The case is an appeal from the justice's court of King county, and involves the construction of § 6755, Bal. Code. The appeal was dismissed by the superior court, on motion, because the court held that under the statute the record did not show that the notice of appeal had been filed before it had been served on the adverse party. But it is not necessary for us to go into a discussion of the merits of this motion, for mandamus will not lie in this case in any event. If the court placed a wrong construction upon the statute,—a question upon which we do not pass,—it was simply an error in the construction of the statute. It is said by counsel for the relator that the decision of the court was upon the construction of a statute, and not as to its validity; that no appeal will lie; and that therefore the relator will be without remedy. We think the relator is without remedy, under the provisions of the constitution, and that matters not involving \$200 are submitted to the discretion and judgment of the superior court, and that a party cannot by indirection obtain a review by this court of a proposition of law which he could not obtain directly by appeal. This question has been decided by this court several times.

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In *State ex rel. Gillette v. Superior Court of Spokane County*, 22 Wash. 496 (61 Pac. 158), the court, in reviewing this proposition, said:

"The petitioner bases his claim to the writ on the ground that there is no appeal or other adequate remedy at law. The constitution provides that, except in certain cases specifically mentioned, the appellate jurisdiction of this court shall not extend to cases where the original amount in controversy or the value of the property does not exceed the sum of \$200, and we have frequently decided that a party litigant cannot by indirection obtain a review of his cause which he cannot obtain directly by appeal. It was evidently the intention of the constitution makers that the superior court should have exclusive jurisdiction in actions where the original amount in controversy did not exceed \$200."

This identical question was again decided by this court in *State ex rel. McIntyre v. Superior Court of Spokane County*, 21 Wash. 108 (57 Pac. 352), where the controversy was an appeal from the justice's court, and where the amount was less than \$200; and we held that the constitutional provision giving the supreme court original jurisdiction as to mandamus of state officers must be construed with reference to the construction of the same section prohibiting the jurisdiction of the supreme court in cases of appeal where the amount in controversy was less than \$200, and hence the supreme court has no jurisdiction by mandamus to compel the superior court to try an action where the amount involved was less than \$200. In many other cases we have held substantially as in those cited.

This cause falling within the rule announced, the writ will be denied.

[No. 3134. Decided April 16, 1901.]

JACOB FURTH, as Assignee of Guarantee Loan and Trust
Company, Respondent, v. D. N. BAXTER, Defendant,
ANDREW HEMRICH *et al.*, Appellants.

APPEAL — FINDINGS OF TRIAL COURT — CONCLUSIVENESS.

In cases tried by the lower court without a jury, where exceptions to the findings and conclusions have been duly taken and the facts have been brought to the supreme court by a certified bill of exceptions or statement of facts, it is the province of the supreme court to examine the facts *de novo* and determine the case by the record, under Bal. Code, § 6520, and hence, in cases of conflicting testimony, the findings of the trial court are not as conclusive as the verdict of a jury, although there may be substantial testimony supporting them.

Appeal from Superior Court, King County.—Hon.
WILLIAM HICKMAN MOORE, Judge. Affirmed.

Julius F. Hale, for appellant Hemrich.

Upton, Arthur & Wheeler, for appellant Sheehan.

The opinion of the court was delivered by

ANDERS, J.—On February 10, 1894, a promissory note was executed in favor of the Guarantee Loan & Trust Company in the sum of \$600, signed by D. N. Baxter and Andrew Hemrich, and indorsed on the back by defendant Sheehan. The note contained a waiver of presentment for payment, protest, and notice of protest for non-payment. The note was subsequently, to-wit, on May 25, 1896, assigned by the Guarantee Loan & Trust Company to plaintiff herein. Suit was begun on said note by plaintiff. Defendant Baxter defaulted. Defendant Hemrich filed a cross-complaint, alleging that he had signed the note with Baxter at the solicitation and for the sole benefit of defendant Sheehan, and asked that he be treated as

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an accommodation maker, and that any decree in favor of plaintiff assignee should require exhaustion of the estate of defendant Sheehan prior to any execution against him (Hemrich). Defendant Sheehan, answering, alleged that he was indorser of said note solely for the purpose of identification, and had no other responsibility; and he denied all of the allegations of the cross-complaint, and asked judgment of dismissal. He alleged further that, treating him as an ordinary indorser, he received no notice of non-payment of the note, such as an indorser would be entitled to, the waiver contained in the face of the note going only to presentment for payment, protest, and notice of protest for non-payment. Upon issues thus joined, trial was had before the court, a jury being expressly waived. The court found, in substance, that Baxter, Hemrich, and Sheehan were makers of the note so far as the plaintiff was concerned. It found further that no part thereof had been paid; that, when it was delivered to defendant Sheehan, defendant Baxter was indebted to Sheehan in a sum greater than \$600, and that the note was treated as a payment on said indebtedness, and that it was understood that said note would be discounted by defendant Sheehan. It found further that when the note was signed by Baxter and Hemrich, defendants, it was *not* the agreement between them and defendant Sheehan that Hemrich should be liable to the payee of the note only as surety for Sheehan. Upon these findings judgment was given against these defendants, and each of them, jointly and severally, for the full sum prayed in the complaint. Hemrich appeals, assigning as error that the court should have found that he signed said note as surety for Sheehan, and that the property of the latter must be exhausted before recourse could be had against him. Sheehan appeals, assigning as error that the court should have

found that he was an indorser for identification only, and was not liable as a maker of the note at all, and that he should have received notice of non-payment.

There is a very considerable conflict in the testimony. It appears to be conceded by the respective counsel that the findings by the judge, a jury being waived, are equivalent to a verdict by a jury. Where a jury finds a verdict on the facts, this court will only weigh the evidence and testimony so far as to determine if there is any substantial testimony to support the verdict. But this rule is not applicable to the extent admitted by counsel in cases tried by the court without a jury, where exceptions to the findings and conclusions have been duly taken and the facts have been properly brought to this court by a certified bill of exceptions or statement of facts. In such cases this court will examine the facts *de novo* and determine the case by the record. Bal. Code, § 6520. The evidence on the part of defendant Hemrich tends to show that Hemrich signed the note at the request and for the sole benefit of defendant Sheehan, and that Sheehan indorsed the note as maker, and not solely for identification. The evidence on the part of defendant Sheehan tends to show that the note was made by Baxter and Hemrich as a payment on a debt due from Baxter to Sheehan, and that, at the request of the manager of the bank, the Guarantee Loan & Trust Company, he indorsed said note, and not as surety, but for purposes of identification. Upon the evidence we are not disposed to disturb the findings of the court on the questions of fact, as we are not satisfied that it erred in that regard.

Defendant Sheehan contends that he was entitled to notice of non-payment of the note. The finding of the lower court that Sheehan indorsed the note as a maker and principal disposes of this question. There was no need

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of notice of non-payment as presentment for payment was waived.

Various errors in rulings of the court as to introduction of testimony are assigned by defendant Sheehan, but we are not convinced that he was prejudiced thereby, and the judgment is therefore affirmed.

REAVIS, C. J., and FULLERTON, J., concur.

DUNBAR, J., concurs in the result.

[No. 3388. Decided April 16, 1901.]

C. DEROBERTS, *Appellant*, v. RICHARD H. STILES *et ux.*,
Defendants, J. W. FRY *et ux.*, *Respondents*.

24	611
29	632
24	611
32	214
24	611
34	611

APPEAL — NOTICE — SERVICE BY MAIL.

Service of a notice of appeal by mail is sufficient, under Bal. Code, §§ 4890, 4891, 6504, when the person making the service and the person upon whom service is made reside in different places between which there is regular communication by mail.

SAME — APPEAL BOND — AUTHORITY OF ATTORNEY TO SIGN.

An attorney has authority to sign his client's name to an appeal bond.

SAME — SUFFICIENCY — GUARANTY COMPANY AS SURETY — SIGNATURE BY ATTORNEY IN FACT.

An appeal bond upon which the surety is a guaranty company whose name is signed by its attorney in fact is not defective in form because evidence of his authority to so sign was not filed with the bond.

SAME — JUSTIFICATION BY GUARANTY COMPANY.

Where the surety upon an appeal bond is a guaranty company, no justification by the surety is required, under the terms of Bal. Code, § 1534.

SAME — SERVICE OF APPEAL BOND OR WRITTEN NOTICE ON RESPONDENT.

Service on respondent of the appeal bond or written notice of its filing is not mandatory under Bal. Code, § 6510, which provides that "any respondent may except to the sufficiency of the surety or sureties in an appeal bond, within ten days after the

service on him of the notice of appeal or within five days after the service on him of the bond or written notice of the filing thereof."

MORTGAGES — REDEMPTION BY MORTGAGOR'S GRANTEE — EFFECT.

A redemption from foreclosure sale by a grantee of the judgment debtor operates the same as if made by the judgment debtor himself, to extinguish the foreclosure proceedings, and the estate then stands as if no foreclosure sale had ever been made, and thereby revives the lien of a subsequent mortgage which would have been barred if no redemption had been made.

SAME — SUBROGATION.

The grantee of a person who has assumed and agreed to pay a mortgage cannot, on making payment, be subrogated to the rights of the mortgagee.

Appeal from Superior Court, Lincoln County.—Hon. CHARLES H. NEAL, Judge. Reversed.

Crow & Williams, for appellant.

Myers & Warren and *James A. Haight*, for respondents.

PER CURIAM.—This cause is here on appeal from the superior court of Lincoln county. Respondents move to dismiss the appeal upon several grounds:

First. That the notice of appeal has not been served in the manner required by law. It is urged that the only service of the notice, as shown by the record, was by mail. We think service by mail is sufficient, under the authority of §§ 4890, 4891, 6504, Bal. Code, when the person making the service and the person upon whom service is to be made reside in different places between which there is regular communication by mail, as was the case here.

Second. That appellant has not filed a bond on appeal, such as the law requires, for the reason that the bond is signed by the attorneys for appellant as principal, and the surety signs by attorney in fact, without filing with the bond evidence of authority to sign. The record shows

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that a bond was in fact filed. Under the provisions of § 19, p. 79, Sess. Laws 1899, the appeal should not be dismissed even if we deemed the bond defective in form, but it would be our duty to order a proper bond to be filed under such terms as might seem to us just. We do not, however, think the bond defective in form. The appellant's name may be signed to an appeal bond by his attorney. *Pennsylvania Mtge. Investment Co. v. Gilbert*, 18 Wash. 667 (52 Pac. 246). The bond shows upon its face that the surety is a guaranty company. The objection that the surety signed by attorney in fact, and that no evidence of authority to sign was filed, is not well taken, for the reason that the omission to file such authority does not make the bond defective in form; and, if respondents desired to challenge the sufficiency of the surety, they should have done so in the superior court under the provision of § 6510, Bal. Code.

Third. That appellant has not served respondents with a copy of the bond, or notice of the filing thereof. To make the appeal effectual, an appeal bond must be filed at or before the time when notice of appeal is given or served, or within five days thereafter. Bal. Code, § 6505. Again,

"Any respondent may except to the sufficiency of the surety or sureties in an appeal bond, within ten days after the service on him of the notice of appeal or within five days after the service on him of the bond or written notice of the filing thereof." *Id.* § 6510.

Notice of appeal having been served, respondents were charged with knowledge, under § 6505, *supra*, that within five days thereafter appellants must file an appeal bond in order to make their appeal effectual. The section does not provide that the bond or written notice of the filing thereof shall be served upon respondents. The only real purpose of such service would be to give respondents an

opportunity to except to the sufficiency of the bond. But § 6510, *supra*, gives to respondents ten days from the date of service of the appeal notice to make such objection, and they must know that at the expiration of five days from the service of the notice of appeal an appeal bond is on file, and they have, therefore, at least five days more within which to call at the clerk's office, examine the bond, and lodge their objections thereto. Respondents' counsel construe the words in § 6510, "or within five days after the service on him of the bond or written notice of the filing thereof," to mean that the bond or a written notice of the filing thereof must in all cases be served. We do not so construe the statute. We think it means that appellant may make such service if he chooses to do so, and, when such service is made, then respondents must object within five days thereafter; but, if such service be not made, then respondents have ten days from the service of the appeal notice within which to object.

Fourth. That the surety on said appeal bond did not justify as required by law, or at all. The bond shows upon its face that the surety is a guaranty company. Section 1534, Bal. Code, provides that "no justification by such company shall be necessary or required." The motion to dismiss the appeal is therefore in all particulars denied, and we will now discuss the merits of the case.

The action is for the foreclosure of a mortgage upon certain real estate in Lincoln county. There is no statement of facts brought here with the record, but the cause is submitted upon the court's findings of facts and conclusions of law. No exceptions were taken to the findings of facts, but the appellant excepts to the second conclusion of law, in which the court concludes from the facts that the foreclosure of appellant's mortgage should be denied, and the cause dismissed, as against the owners of the

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land. Briefly stated, the facts as found by the court are as follows: That on the 26th day of April, 1898, one Henry Neilson was the owner in fee simple of certain land, which is described, and he was at all times mentioned an unmarried man; that on said date said Neilson executed his promissory note to the Northern Counties Investment Trust, Limited, a corporation, for \$1,600; that for the purpose of securing the payment of said note said Neilson on said date executed to said corporation his mortgage upon the land described; that on the same date said Neilson sold said real estate to the defendant Richard H. Stiles for the sum of \$5,100, and executed and delivered to said Stiles his warranty deed for the same; that in said warranty deed, and by the terms thereof, the said Stiles assumed and agreed to pay said \$1,600 mortgage above mentioned, the said \$1,600 being part of the purchase price paid by said Stiles to said Neilson for said real estate; that on the same date, for the purpose of securing the payment of the balance of the purchase price for said real estate, to-wit, the sum of \$3,500, the said Stiles and wife executed and delivered to said Neilson their promissory note for the sum of \$3,500, payable five years after date; that for the purpose of securing the payment of said note said Stiles and wife on said date executed and delivered to said Neilson their mortgage upon said real estate, which mortgage was duly recorded on the 6th day of May, 1898; that on the 12th day of December, 1896, default having been made in some of the conditions of said \$1,600 mortgage, the said Northern Counties Investment Trust, Limited, began an action to foreclose said mortgage in the superior court of Lincoln county, and that said Neilson, who was then the holder of the \$3,500 mortgage, and the said Stiles and wife, were made parties defendant therein; that afterwards, to-wit, on the 12th day of April,

1897, a decree of foreclosure was duly and regularly entered in said cause, wherein it was decreed that plaintiff should recover judgment for \$2,096.64, and for attorney's fees and costs, and that said real estate should be sold for the satisfaction of said judgment; that afterwards, to-wit, on the 17th day of May, 1897, the sheriff of said county sold said real estate at execution sale, under and by virtue of an execution and order of sale issued in pursuance of said decree, to said Northern Counties Investment Trust, Limited, the plaintiff in said cause, for the sum of \$2,315.92, the same being the amount due plaintiff under said decree, and the said sheriff issued to said purchaser a certificate of sale for said real estate; that afterwards, to-wit, on the 14th day of May, 1898, said Stiles and wife, by quitclaim deed of that date, for the consideration of \$1, conveyed said real estate to the defendant J. W. Fry; that at the time of taking said quitclaim deed said Fry had notice of the existence of the \$3,500 mortgage aforesaid; that on the 14th day of May, 1898, after obtaining said deed from said Stiles and wife, said Fry proceeded to redeem, and did redeem, the said real estate from the said sheriff's sale, and did pay to the sheriff of said Lincoln county on said redemption the amount due on said certificate of sale, to-wit, the sum of \$2,593.85; that in pursuance thereof the said sheriff did, on the 17th day of May, 1898, execute and deliver to said Fry a certificate of redemption for said real estate, and the same was thereafter recorded on the same day in the auditor's office of Lincoln county; that said Northern Counties Investment Trust, Limited, received from said sheriff the said sum of \$2,593.85, so paid by defendant Fry for the purpose of redemption of said real estate, and did receive said money in full satisfaction of its claim under said certificate of sale; that on the 24th day of June,

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1898, said Neilson, being then the owner of said \$3,500 note and mortgage, duly assigned the same in writing to the plaintiff, De Roberts; that said assignment was duly recorded on the 29th day of June, 1898, and plaintiff has been ever since said 24th day of June, 1898, and is now, the legal owner and holder of said mortgage; that in purchasing said real estate on the 14th day of May, 1898, and in the redemption thereof shortly thereafter, the said Fry acted in his own behalf and in the best of faith, and there was no conspiracy between said Fry and said Stiles, and no understanding or agreement that Fry was to redeem said land for the use and benefit of Stiles, that no payments have been made upon said \$3,500 note set forth in the complaint, and that the defendants Richard H. Stiles and Mary C. Stiles, his wife, are now indebted to plaintiff on said note in the sum of \$3,500, together with interest thereon from the 26th day of April, 1893, at the rate of 10 per cent. per annum; that they are further indebted to plaintiff in the sum of \$200, which sum the court finds to be a reasonable attorney's fee in this action. Upon the foregoing facts the court found as conclusions of law that plaintiff is entitled to judgment against said Stiles and wife for the amount due upon their said note of \$3,500, but that he is not entitled to a foreclosure of his mortgage upon said land, and that the defendants Fry and wife are entitled to a judgment dismissing this action as to them, with judgment against plaintiff for their costs. Judgment was accordingly entered, and the plaintiff, De Roberts, has appealed from said judgment.

The judgment of the court below, we apprehend, was based upon the theory that the then holder of the mortgage now in suit was made a party defendant to the former foreclosure proceedings on the \$1,600 mortgage, and that,

as he did not set up any claim in that action under his mortgage, and did not redeem from the sale which was made under said foreclosure proceedings, his mortgage is now barred. If title had passed by the sheriff's sale to a purchaser, that would undoubtedly be true. In that event all rights of the second mortgagee or his assignee would have been forever barred. But that is not the case presented here. When Fry took the title to this land by the quitclaim deed from Stiles, he stood in Stiles' shoes in all particulars, so far as his relation to this land was concerned. At the time Stiles deeded to Fry, he (Stiles) had the right to redeem from the mortgage sale, and by so doing the effects of the sale would have been determined, and he would have been restored to his estate. 2 Hill's Code, § 515. This court has said in *Singly v. Warren*, 18 Wash. 434, 445 (51 Pac. 1066, 1069, 63 Am. St. Rep. 896):

"A certificate of sale executed by a sheriff does not pass title. At most, it is only evidence of an inchoate estate, which may or may not ripen into an absolute title."

In any event, aside from the question of where the title rests during the redemptionary period, the section of the statute above cited provides for a complete restoration of the estate upon redemption being accomplished. The estate stands as if no sale had ever been made. Stiles, by his deed to Fry, transferred his right of redemption to Fry, and, when Fry redeemed, the estate was restored, as if no sale had been made.

"When the redemption is made by the defendant or his heirs, devisees, grantees, etc., the sale of the premises so redeemed and the certificates of such sale shall be null and void; the proceeding is at an end." *Phyfe v. Riley*, 15 Wend. 248, 252 (30 Am. Dec. 55).

"He was the grantee of the judgment debtor, and the owner of the land, subject only to the rights of the pur-

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chaser, at the sale on execution, and the lien of the McCarty mortgage. He cannot be said to have had a lien upon the land. He was the owner of the fee. Redemption by him did not have the effect of transferring to him the rights of the purchaser, subject to be defeated by other redemptioners; it terminated the sale, and restored him to his estate exactly as it was before the sale took place, except that the judgment upon which the sale was made was satisfied. All other liens, prior and subsequent, remained unimpaired." *Warren v. Fish*, 7 Minn. 432, 440.

"Upon principle it is difficult to see wherein the rights of a successor in interest redeeming are to be distinguished from those of the judgment debtor himself. The statute gives the right of redemption to the judgment debtor or successor in interest, but declares that when the judgment debtor shall redeem, the effect of the same shall terminate, and he shall be restored to his estate. A conveyance by the debtor can confer no greater rights than he himself had. It cannot disencumber the property, or give a better or superior title. The successor is not a *bona fide* purchaser for value, but simply occupies the shoes of his predecessor with no new or enlarged rights or privileges, and can neither exercise nor enjoy any that the judgment debtor did not possess or could not have enjoyed." *Flanders v. Aumack*, 32 Ore. 19 (51 Pac. 447, 449, 67 Am. St. Rep. 504).

Respondents' contention that the grantee of the judgment debtor has greater rights than the judgment debtor himself cannot, therefore, prevail. The contention that the judgment in foreclosure barred appellant's mortgage must also be denied, for the reason that the redemption by the owner of the land extinguished the foreclosure proceedings. Redemption by a mortgagee or any other redemptioner than the owner of the land would have led to a different result. Such a one would have been entitled to a sheriff's deed transferring the absolute title to him, unless appellant

had redeemed from such redemption under the statute. A sheriff's deed to such a one would then have made the foreclosure proceedings an absolute bar to appellant's mortgage.

Respondents urge that, in any event, if appellant's mortgage is held to be an existing lien upon the land, Fry, having paid the amount of the first mortgage, must be subrogated to the rights of the first mortgagee. We think not. In *Goodyear v. Goodyear*, 72 Iowa, 329 (33 N. W. 142), it is held that neither the purchaser of land subject to a mortgage which he assumed and paid, and which formed part of the purchase price, nor his grantee, is entitled to subrogation to the rights of the mortgagee as against a judgment creditor of the mortgagor whose judgment had been rendered at the time the land was bought by the purchaser. We think the court erred in its second conclusion of law. We hold that appellant's mortgage is a valid and subsisting lien against the land, and that he is entitled to a decree of foreclosure. The judgment is therefore modified in this, to-wit: That part of the judgment appealed from shall be vacated, and a decree foreclosing appellant's mortgage against said land shall be entered, with costs taxed against respondents Fry and wife.

[No. 3517. Decided April 16, 1901.]

M. D. DUNLAP, *Respondent*, v. E. M. RAUCH, *Appellant*.

CORPORATIONS — RECEIVER — ACTION BY CREDITOR ON STOCK SUBSCRIPTIONS — AMENDMENT OF COMPLAINT.

Where, pending an action at law by a creditor to recover upon an unpaid subscription to the capital stock of a corporation, there being no disclosure of other creditors or of any inadequacy of assets at the institution of the action, a receiver is appointed in a subsequent action on the ground of the corporation's

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insolvency, the action of the court in allowing the creditor to continue her action for the benefit of all the creditors and ordering the proceeds of the judgment obtained by her to be disbursed by the receiver, was not erroneous, although the court did not direct amendments of the pleadings or a formal substitution of the receiver.

CORPORATE STOCK — PAYMENT IN PROPERTY.

Where property is given in payment of a subscription to the capital stock of a corporation, the property must be worth in cash the amount of the subscription for which it is offered; and the estimate of value placed upon such property by the stockholders is not conclusive on the courts.

Appeal from Superior Court, Garfield County.—Hon. MELVIN M. GODMAN, Judge. Affirmed.

Tweedy & Jewett, for appellant.

Gose & Kuykendall, for respondent.

The opinion of the court was delivered by

REAVIS, C. J.—Suit to recover upon unpaid subscription to the capital stock of a corporation. Plaintiff recovered judgment against the corporation defendant, C. A. Lundy & Co., in an action at law, execution was issued thereon, the property of the corporation exhausted, and the execution returned, with the sum of \$2,126.12 unsatisfied. Thereupon plaintiff commenced the present action to recover from the defendants E. M. Rauch and C. A. Lundy the remainder of the judgment. Rauch and Lundy, when the corporation was formed, subscribed for the entire capital stock, in the sum of \$50,000, each subscribing for \$25,000 thereof. The complaint alleges these facts, and also that Lundy and Rauch were the managers of the corporation since its formation; that each had paid on his subscription the sum of \$12,500; that there was due from each on his subscription the sum of \$12,500; that the corporation has no assets or property excepting the

unpaid subscription of the defendants Rauch and Lundy; and plaintiff concludes with a prayer for judgment against defendants Rauch and Lundy for the sum unpaid. Defendants Rauch and the corporation answered jointly, and alleged that it was agreed between the incorporators defendant that property and money be accepted as payment in full for all the capital stock of the corporation, and alleging that property was so conveyed in payment of the whole stock subscription, and alleged the insolvency of the corporation at the commencement of plaintiff's action, and knowledge to plaintiff of such insolvency. After denying the subscription in writing for the whole capital stock, and stating that it was oral, defendants, by amended answer, set up supplementary matter that, in an action brought subsequently to the present action, wherein defendant Rauch was plaintiff and the corporation C. A. Lundy & Co. was defendant, the corporation was adjudged insolvent, and one H. M. Beach appointed receiver thereof, and that Beach accepted the appointment. Plaintiff replied to the amended and supplemental answer, denying knowledge sufficient to form a belief. While the cause was pending, and prior to its final decision, plaintiff, after due notice to defendants, filed a written offer requesting that an order be entered substituting as plaintiff H. M. Beach, the receiver mentioned in the supplemental answer, and offering, if such substitution was not made, to assign any judgment entered in her favor to Beach as receiver. She requested that the court provide that any judgment entered in her favor be for the benefit of all the creditors of defendant corporation, and that any moneys collected thereon be distributed *pro rata* to all the creditors. Upon the issues made a trial was had, and the court called a jury, and submitted certain interrogatories to it. Evidence was introduced by the respective parties. The interrogatories

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do not appear to have been answered by the jury. The court considered the testimony, and made its findings of fact and conclusions of law. The findings, in addition to those above, state that the defendants Rauch and Lundy, at the time of the commencement of the suit, each owed \$10,000 upon his unpaid subscription to the capital stock of the corporation; and it was decreed that plaintiff have judgment for the amount demanded in her complaint against each of the said defendants Rauch and Lundy; that the judgment be collected upon execution, and the proceeds thereof disbursed by the receiver, H. M. Beach, to the creditors of the corporation, C. A. Lundy & Co.

Numerous assignments of error are made by appellant, and the briefs are extensive and somewhat involved. The main contention is that the complaint states an action at law against stockholders on their unpaid subscription, and that in such form it cannot be maintained. We have frequently observed that the form of action is immaterial, if the facts stated entitle the plaintiff to any relief, and the case is fairly tried. The case of *Hurlbutt v. N. W. Spaulding Saw Co.*, 93 Cal. 55 (28 Pac. 795), is pertinent. The court observed:

“There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs (Code Civ. Proc. § 307), and the facts constituting the cause of action are required to be stated in ordinary and concise language. Here the plaintiffs stated in their complaint their cause of action in clear and intelligible language, and the defendants answered thereto. The court was therefore authorized to try the case as made, and to grant any relief embraced in the issues.”

To the same effect, this court said, in *Surber v. Kitten-ger*, 6 Wash. 240 (33 Pac. 507):

“Although an action may be commenced as an equitable

one, yet, where there is nothing to give a court of equity jurisdiction thereof, the court has authority to permit it to be tried as an action at law, if the defendant is not thereby prevented from having a fair trial."

In *Burch v. Taylor*, 1 Wash. 245 (24 Pac. 438) it was ruled that the unpaid subscription to capital stock was a trust fund, to be reached in equity by the creditor. An equitable suit by a judgment creditor, when recourse against the property of the corporation was exhausted, was maintained in *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614 (48 Pac. 415), and *Kroenert v. Johnston*, 19 Wash. 96 (52 Pac. 605). In *Shuey v. Adair*, ante, p. 378 (64 Pac. 536), it was said, relative to the constitutional liability added to the stockholder in a banking corporation:

"In the only other case where this constitutional provision was directly before this court, the case of *Watterson v. Masterson*, 15 Wash. 511 (46 Pac. 1041), we held that a creditor could not maintain an action to enforce this liability after a receiver had been appointed to wind up the affairs of the corporation, even though the action was prosecuted on behalf of all of the creditors of the corporation, and the receiver was made a party defendant in the action. . . . But in neither of these cases did this court prescribe, or undertake to prescribe, what form of procedure was necessary in order to charge the stockholders upon their superadded liability. . . . On this question we went no further than to hold that the action brought against the stockholders directly, whatever its form, must be prosecuted by the receiver in all cases where a receiver has been appointed to administer the assets of an insolvent banking corporation."

In *Gager v. Bank of Edgerton*, 101 Wis. 593 (77 N. W. 920), it seems, in substance, to be held that the action can be maintained either through creditors on their own behalf or through a receiver, but that both remedies cannot be pursued. 3 Thompson, Corporations, § 3482, attempts to reconcile the cases as follows: The assets of an in-

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solvent corporation are a trust fund for the benefit of all the creditors, and a single creditor will not be allowed to proceed where it appears either that there are other creditors, or that there is not enough for all; and a complaint will not be demurrable unless it appears that there are other creditors of equal standing with plaintiff, or that there are not sufficient assets for all; and he also suggests that a single creditor may proceed alone without mentioning other creditors, or, if proceeding in their behalf, this will not prevent them from coming in and being made co-plaintiffs on their own behalf. These views seem to be recognized in *Brundage v. Mining Co.*, 12 Ore. 322. (7 Pac. 314).

It will be observed plaintiff commenced this action when there was no disclosure of other creditors or of any inadequacy of assets to meet all claims against the corporation. Pending the suit, one of the defendants commenced an action in the same court for the appointment of a receiver, and, upon his petition, Receiver Beach was appointed. Thereupon the plaintiff in the present action requested that the receiver be substituted for herself, or, in effect, that her cause be continued for the benefit of all the creditors, and such relief be given as pertained to equity. The court proceeded according to this theory, concluded the action, and gave relief for the benefit of all the creditors. We deem it of no consequence that the court did not direct amendments of the pleadings or a formal substitution of the receiver, and we are not disposed to disturb or to interfere with the discretion exercised by the trial court in this regard.

Relative to the plea in the answer of payment in property by agreement of the corporators, the court found adversely to such agreement, and that such payment was not made. While there has been some conflict in the expres-

sions of this court as to the effect of payment of capital stock in property, the most frequent and best considered expressions approve the rule stated in *Adamant Mfg. Co. v. Wallace, supra*; that is, in substance, that the subscription to capital stock must be paid in money or money's worth, and that the estimate of the value placed upon the property by the stockholders of the corporation is not conclusive upon the courts.

We have examined the testimony, and conclude that the facts found by the superior court are fully supported by the evidence. The judgment is affirmed.

FULLERTON, DUNBAR, and ANDERS, JJ., concur.

[No. 3570. Decided April 16, 1901.]

NORTH WESTERN LUMBER COMPANY, *Appellant*, v. CHEHALIS COUNTY *et al.*, *Respondents*.

TAXATION — ILLEGAL ASSESSMENT — REMEDY BY INJUNCTION.

The courts of this state have power by injunction to restrain the enforcement of an illegal tax upon real property and to remove the apparent lien created by the invalid levy.

SAME — PLACE OF TAXATION — PERSONAL PROPERTY OF CORPORATION.

Section 9 of the act of March 15, 1893 (Laws 1893, p. 327), which provides that personal property pertaining to the business of a manufacturer shall be listed in the town or place where his business is carried on, must be construed in connection with other sections of the same act which require corporeal personal property to be assessed in the school district and road district in which it is actually situated at the time the assessment is made, and hence a milling corporation which has its office and part of its personal property within the corporate boundaries of a town cannot be assessed for municipal taxation upon its corporeal personal property which is situated just beyond the corporate limits of the municipality.

Appeal from Superior Court, Chehalis County.—Hon. JAMES A. WILLIAMSON, Judge. Reversed.

Sidney Moor Heath, for appellant.

George D. Schofield and *Irwin & Bridges*, for respondents.

The opinion of the court was delivered by

FULLERTON, J.—The appellant is a private corporation engaged in the business of manufacturing and selling lumber and lumber products in Chehalis county, in this state. The respondent John G. Lewis is the treasurer of Chehalis county, and *ex officio* tax collector of the respondent town of Hoquiam, which is a municipal corporation of the fourth class. The town of Hoquiam was incorporated pursuant to the general laws of this state by proceedings had before the county commissioners of Chehalis county. In these proceedings the territory embraced within the corporate limits of the town was not described by metes and bounds, but by reference to certain town plats then on file with the county auditor, mentioning them by name only. The plats did not describe adjoining lands, and the town as incorporated was composed of two distinct tracts separated by the Hoquiam river, along which at this point the tide ebbs and flows. Between the main portion of the town and Gray's Harbor is a strip of tide lands, which also is excluded from the boundaries of the town as described. In 1894 the appellant had in the Hoquiam river and on the tide lands adjoining it and the tide lands between the town and Gray's Harbor a large amount of personal property, consisting of saw logs, lumber, wharves, docks, milling machinery, and the usual equipments found about a sawmill property, which was subject to taxation in the county of Chehalis for state, county, and school purposes. The appellant's mill office and certain of its personal property was within the corporate boundaries of the town of Hoquiam, and in making its return to the as-

essor the appellant listed its property in such manner as to show what was within and what was without the town. The assessor, conceiving that all of the property was assessable for municipal purposes by the town of Hoquiam, returned it upon the assessment rolls as such. The appellant paid the state, county and school taxes levied thereon, tendered to the treasurer the amount which it admitted could be lawfully assessed by the town of Hoquiam, and refused to pay the remainder. The treasurer thereupon levied upon and advertised for sale certain of the appellant's property for the purpose of making the amount of the assessment, and this action is brought to enjoin such sale, and to have the tax levy declared void.

As a preliminary question, the respondent urges that the action will not lie; that equity will not enjoin the seizure and sale of personal property when levied upon by an officer for unpaid taxes, even though the tax sought to be collected is void, but that the remedy is by an action at law for damages. Whatever may be the rule on this point in other jurisdictions, this court has taken the opposite view. We have repeatedly held that the courts have power by injunction to restrain the enforcement of an illegal tax upon real property, and to remove the apparent lien created by the invalid levy. In *Phelan v. Smith*, 22 Wash. 397 (61 Pac. 31), we applied the rule to personal property, saying that "the principle is exactly the same, and the interference with the powers of the government in the collection of its revenue is the same." This case is decisive of the question here raised, and it is unnecessary to pursue the inquiry further.

It is next said that the property was within the corporate limits of the town of Hoquiam. The argument in support of this is, that the boundaries of the town as fixed by the board of county commissioners are vague and indefi-

nite and that, when this condition exists, the practical interpretation as to boundaries given the incorporation proceedings by the corporate authorities, should be controlling upon the courts. Whether the officers of the municipality ever contended in any other instance than this, that the territory upon which this personalty was situate is within the corporate limits of the town, the record is silent, and this one instance would hardly be sufficient to establish the general rule. But perhaps the best answer to this contention is to say that the boundaries of the town as fixed by the commissioners are not indefinite. The plats mentioned covered specific tracts of land, capable, as the copies of the plats exhibited in the record show, of exact demarcation. They show clearly that the tract in question was not included in any of the plats, and hence there is no room for the application of the rule contended for, even were the evidence sufficient to furnish a just basis for its application.

Lastly, it is contended that the property was properly assessable by the town of Hoquiam because the mill office of the appellant was located within the town. Our attention is called to § 9 of the act of March 15, 1893 (Session Laws 1893, p. 327), as determinative of this question. That section is as follows:

“Personal property, except such as is required in this act to be listed and assessed otherwise, shall be listed and assessed in the county where the owner or agent resides. If there be no principal office or place of business in this state, then at the place in this state where any such corporation or person transacts business. The personal property pertaining to the business of a merchant or of a manufacturer shall be listed in the town or place where his business is carried on.”

Standing alone, this section might lend color to the respondent's contention, but subsequent sections of the act

require corporeal personal property to be assessed in the school district and road district in which it is actually situated at the time the assessment is made, regardless of whether the owner has his principal place of business or resides within such districts or not. It is plain that, if § 9 is to be given the construction contended for, these subsequent sections will be rendered inoperative, and we think this character of personalty must be held to fall within the exception contained in that section, and must be assessed at the place of its location, and not at the residence or place of business of its owner.

The judgment is reversed, and the cause remanded, with instructions to enter a judgment in favor of the appellant in accordance with the first, second, and sixth subdivisions of the prayer of its amended complaint.

REAVIS, C. J., and DUNBAR AND ANDERS, JJ., concur.

[No. 3698. Decided April 17, 1901.]

FALL AND SOCKEYE FISH COMPANY, *Respondent*, v. POINT
ROBERTS FISHING AND CANNING COMPANY, *Appellant*.

FISH AND FISHERIES — LOCATION OF TRAPS — SALE — CAVEAT EMPTOR
— RIGHTS OF PURCHASER.

Where plaintiff purchased at a receiver's sale one of two fish traps owned and operated by defendant, with actual knowledge that the two locations were within the lateral limits allowed by statute, the rule of *caveat emptor* applies, and plaintiff having purchased with knowledge of the defect must be satisfied therewith, and is not entitled to enjoin defendant from operating its remaining trap within the statutory distance of 2,400 feet from the one purchased by plaintiff, but its remedy is restricted to restraining defendant from moving its trap location closer than it was at the time of sale.

Appeal from Superior Court, Whatcom County.—Hon.
WILLIAM HICKMAN MOORE, Judge. Reversed.

Dorr & Hadley, for appellant.

Kerr & McCord, for respondent.

The opinion of the court was delivered by

MOUNT, J.—In the year 1898 appellant was the owner of two pound net fishing locations off Point Roberts, in the Gulf of Georgia, in Whatcom county. These locations were commonly known as “House Trap” location and “Goodfellow Trap No. 12.” House trap location was west laterally a distance of 2,535 feet from another location known as the “Milligan Trap,” owned by respondent. The Goodfellow Trap No. 12 was west laterally 2,060 feet between the nearest points from House trap location. In the year 1898, the appellant company being insolvent, a receiver of said company was appointed by the superior court of Whatcom county, and said receiver took charge of these two locations, viz., House trap and Goodfellow No. 12, with other property. Subsequently, in February, 1899, under order of said court, said receiver sold the Goodfellow No. 12 to one E. W. Purdy, who, before the time of sale by the receiver to him, had agreed to sell to respondent. The funds realized upon this sale liquidated all the debts of appellant, and the House trap location was by said receiver thereupon returned to appellant company. At the time the contracts of sale were entered into, it was not known by either appellant or Purdy, respondent or the receiver, that the two locations mentioned, viz., House trap and Goodfellow, were within the lateral limits allowed by law, viz., 2,400 feet. After the sale had been reported to the court, but before the purchase price had been paid to the receiver, on March 31, 1899, all the parties interested therein became aware of the fact that the locations were “too close,” but the exact distance was not known. When the 1899 locations were driven, subsequent to April, the

Goodfellow trap owned by respondent was driven slightly to the east of the 1898 location. The House trap location, owned and driven by appellant, was driven some 30 to 200 feet to the west of the 1898 location, bringing the said traps still nearer together. Each of said locations was extended some distance further out to sea. Respondent brought this action to restrain appellant from the operation of the said House trap location, claiming to be a purchaser in good faith of the Goodfellow No. 12, and that the said House trap location was within the lateral distance prohibited by law, and upon trial a decree was accordingly entered.

It appeared from the evidence at the trial that the water to the east of House trap location, sufficiently far to be outside of the limit of the Milligan location, is beyond the depth wherein traps are permitted by law; so that, in order to exist in compliance with the said law, either the Goodfellow must move westward or House trap location must be abandoned entirely, and the question presented on this appeal is whether or not respondent, at the time of purchase, was bound to take notice of the distance of Goodfellow trap No. 12 from House trap location, notwithstanding the receiver had impliedly represented that the said Goodfellow trap was a legal location, and that he would convey the "unincumbered title to said property to the purchaser." All the authorities cited by both appellant and respondent go to this question. It is conceded by respondent that the rule of *caveat emptor* ordinarily applies to judicial sales, but it is contended that the rule does not apply here, for the reason that before the sale by order of the court, but after the agreement of sale had been entered into between the receiver and said Purdy, said receiver called a meeting of the stockholders of appellant company, and explained to them the terms and conditions of the sale,

to which all agreed, and no objection was made thereto, and that whatever warranty as to the title was made by said receiver was made with the knowledge and consent of the said stockholders. The record shows that at the time of the agreement referred to, and at the time of sale, and of the said meeting of the stockholders, none of the parties interested knew of the fact that the said trap locations were within the lateral distance prohibited by law; but on the day before the purchase price was paid the appellant learned this fact, and thereupon it was immediately reported to the purchaser, who, notwithstanding this knowledge, paid the money and took possession of the property. The rule is well settled that at said time at least two courses were open to the purchaser, viz: (1) He might rescind the contract (Benjamin, Sales [Bennett's Notes, 1888] § 414 *et seq.*; 15 Am. & Eng. Enc. Law [2d ed.], p. 1224; Kleber, Void Judicial Sales, § 465); or, (2) purchasing and receiving the property with actual knowledge of the defect, he must be satisfied therewith (1 Parsons, Contracts [8th ed.], 577; 2 Schouler, Personal Property, § 322 *et seq.*; Biddle, Warranties, § 142 *et seq.*; Kleber, Void Judicial Sales, p. 412; 15 Am. & Eng. Enc. of Law [2d ed.], 1221-3).

It purchased with eyes open. It was at liberty to investigate. In fact, the record shows that previous to that time it had had surveys made which showed the relative positions of all the locations in the vicinity of its purchase, and had better facilities and means of knowing the exact location of Goodfellow No. 12 with reference to other locations, and better facilities for knowing the exact distances between said traps, than appellant had. There was no latent defect in the location of these traps. The defect, if any at all existed, was open. The property was within its reach, in easy distance, and in plain view; the defect

had been reported by appellant; and respondent had maps of all these locations and surroundings drawn to scale. It is difficult to understand, under these circumstances, upon what equitable principle the purchaser from Purdy can now call upon appellant to abandon the House trap location in order that Goodfellow trap No. 12 may exist. It would certainly follow that, if appellant had sold to respondent directly, whether with or without warranty of title, appellant could not thereafter be heard in a court of equity to complain that the location sold by it was "too close" to another location owned by it and was therefore void. It seems equally clear that, where respondent purchased of appellant with the facts equally within the knowledge of all parties interested, where there was no concealment or *mala fides* on the part of the seller, and where the purchaser had as good an opportunity of knowing the facts, not only from observation, but from a plat drawn to scale, upon which the distances might be measured, the purchaser may not only have what it purchased, but at the same time restrain the operation of a trap owned and operated at the same place in which it was at the time of purchase, and thereby obtain not only the location purchased but also another equally, and perhaps more, valuable. It follows that, if the said Goodfellow trap No. 12 and House trap location had been constructed in the year 1899 upon identically the same locations which they had respectively occupied the previous year, neither party could have any equitable relief against the other. What, then, was the effect of the changes made by each of the parties hereto subsequent to the purchase? The evidence shows that the Goodfellow trap No. 12, owned by respondent, when it was driven for the year 1899, was located slightly to the east of its 1898 location some 10 or 15 feet. The evidence also shows that it is not

always practicable to drive a succeeding trap, which is constructed of piles 75 to 125 feet in length and 18 to 24 inches in diameter, in the same identical place as the previous one, but by custom it is driven alongside, varying from 10 to 30 feet, according to the condition of the old piling, which frequently is broken off so that it cannot be removed. Both traps appear to have been driven after this manner, each toward the other trap. The evidence as to the driving of the House trap location was somewhat contradictory, but we think the weight of the evidence shows it to have been located west from the 1898 location 60 feet at the inner end and 200 feet at the outer end. This distance was an unwarrantable encroachment upon the lateral distance of the two locations, and to this extent was not authorized. Under the evidence in the case, for the reasons above given it was error for the lower court to restrain the operation of House trap location within 2,400 feet of the location of Goodfellow trap No. 12 as constructed in 1899. The evidence justified an order restraining the appellant from constructing and operating House trap location further west than its location in 1898, but no other or different relief.

The cause will be reversed, with instructions to the lower court to enter a decree in accordance with this opinion.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3317. Decided April 18, 1901.]

E. H. WATKINS *et al.*, Appellants, v. THOMAS DORRIS
et al., Respondents.

INJUNCTION — WRONGFUL ISSUANCE OF TEMPORARY INJUNCTION — DIS-
SOLUTION ON FINAL HEARING — NO REMEDY BY APPEAL.

The action of the court in granting and continuing a temporary injunction pending the final disposition of an action cannot be reviewed on appeal, where the temporary injunction was dissolved on final hearing, but the remedy of defendant, if injured by its wrongful issuance, is by suit upon the injunction bond.

NON-NAVIGABLE STREAMS — WHEN PUBLIC HIGHWAYS — FLOATABILITY FOR LOGS.

A stream eighteen miles long, with an average width of one hundred feet and depth of three feet, which can, during annually recurring freshets, be used profitably for the floating of logs to market, must be held to be a public highway for the purpose of floating logs and timber products, within the contemplation of Bal. Code, §§ 4378-4386, which provide that, for the purpose of booming and floating logs and timber products, all navigable waters in the state shall be deemed public highways.

SAME — PERSONS ENTITLED TO USER.

The statutes of this state which declare non-navigable streams upon which logs can be made floatable public highways and authorizing their use as such by corporations organized for booming and floating logs, must be held as conferring the same rights upon individuals.

SAME — OWNERSHIP OF BED OF STREAMS.

Art. 17, § 1, of the constitution, which reserves title to the state in the beds of all navigable streams below the line of ordinary high water mark, has reference only to such streams as are navigable for general commercial purposes, and not to those which are public highways merely for the floating of logs and timber products.

SAME — RIGHTS OF RIPARIAN OWNER.

Although a non-navigable stream upon which logs are floatable may be a public highway so far as the floating of logs is concerned, persons or corporations using it for that purpose have no right to interfere with the bed of the stream, or with its

24	636
34	274
34	275
35	494
435	497
24	636
142	48

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banks, for the purpose of removing obstructions, without the riparian owner's consent, or the exercise of the right of eminent domain, where title to the bed of the stream is in such riparian owner.

SAME — DAMAGES AS RESULT OF LOG JAM.

A riparian owner upon the banks of a stream which is navigable only for logs in time of freshets, is entitled to damages, where his lands become overflowed by reason of the formation of a jam in the stream due to the negligence of parties floating logs therein.

Appeal from Superior Court, Wahkiakum County.—
Hon. HENRY S. ELLIOTT, Judge. Affirmed.

J. Bruce Polwarth and George Noland, for appellants.

Sol. Smith, for respondents.

PER CURIAM.—This action was instituted by appellants, who compose a partnership doing a logging business under the firm name of the Elochoman Logging Company, in the county of Wahkiakum, state of Washington. Appellants are the owners of certain timber lands situate upon and adjacent to the stream named and designated as the Elochoman river, or Elochoman creek, and have for some time been engaged in cutting and removing from said premises the merchantable spruce and fir timber thereon, and by means of said stream have been transporting the sawlogs cut from said timber to tide water, for the purpose of booming and rafting the same there for transportation to the market. The action was brought against Thomas Dorris and William Dorris, respondents here; and said Thomas Dorris is also an appellant. Said Thomas Dorris is the owner of certain other lands lying upon both sides of said stream and below the lands of appellants, the Elochoman Logging Company. During the month of November, 1897, the said logging company, having theretofore placed about fifteen hundred logs in said stream, undertook to run the

same down the stream where it passes through the lands of said Thomas Dorris. At a point in said stream where it passes through the lands of said Thomas Dorris is a large rock, so situated and embedded that, when said appellants' logs were carried down by a freshet then occurring, their passage was obstructed by said rock, a jam was formed, and the waters of the stream were thereby backed and caused to overflow the lands of said Thomas Dorris. The said appellants then sought to break said jam, and alleged in their complaint that the only way of approaching thereto was from the banks of said stream, over the lands of the respondent Dorris, and that said respondents prevented the appellants from making such approach and from entering upon said lands for said purpose, and had threatened appellants with personal violence if they should undertake to go upon said lands for said purpose. They further alleged that the force of the water at said point was insufficient to break said jam, and that it could only be done by men aided by steam or horse power operated upon the banks of said stream, on the lands of the said respondent. They also alleged that the value of the logs held by said jam was \$8,000, and that they had been damaged in the sum of \$2,000 by the conduct of the Dorrises in preventing them from going upon said lands to break said jam, and prayed judgment for said sum, and also prayed for a temporary restraining order preventing the respondents from in any manner interfering with the appellants' entering upon the banks of said stream for the purpose of breaking said jam, and also preventing them from interfering with the removal of the rocks from the bed of the stream which were obstructions to the passage of said logs. Upon the showing made, the court granted the temporary restraining order, without notice, and fixed a date in the order when respondents should, after notice, show cause

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why a temporary injunction should not issue pending the final hearing of the cause. A hearing was had at said time, and the court continued the temporary injunction until the final hearing of the cause. Assignments of error are urged by the appellant Thomas Dorris as to the course of the court at the time of the hearing when the temporary injunction was continued, but, in view of the subsequent history of this case, we do not deem it necessary to discuss them here, as will appear later in the course of this opinion. Thereafter the respondents answered the complaint, and admitted the fact that the log jam existed, but alleged that the same was caused by the insufficient capacity of said stream to float logs, and by the mismanagement and unskillful manner of appellants in driving said logs, together with their gross negligence and want of care and utter indifference to the injury resulting therefrom. They deny that said rock was in the bed of the stream, and aver that it was then, and for many years theretofore had been, embedded in and formed a part of the west bank of said stream, where it was a valuable protection to the bank of the stream, and also formed a portion of the fence inclosing the cultivated lands of said Thomas Dorris, and was situated upon his land, and formed a part thereof. The respondent Thomas Dorris alleges that he is the sole owner of said land; that said stream is not a meandered stream or a public highway, and is not navigable where it flows through the said lands; that the said stream was duly surveyed and disposed of by the United States, long before the state of Washington was admitted into the Union, under and by virtue of the land laws of the United States, and is a private stream not of sufficient size and volume at any stage of the water, in its natural state, to be of public utility, or to float sawlogs to market, when it flows through the lands of said Thomas Dorris, or above

said lands, but is a short mountain creek, depending upon the rainfall for the volume of its waters. The reply puts in issue the material averments of the answer. At the trial of the cause a large number of witnesses were examined. The statement of facts filed in this court contains more than four hundred pages of transcribed testimony. As an advisory matter, the court submitted to the jury the questions of fact propounded by the interrogatories hereinafter set forth, and after due deliberation the jury returned their answers thereto as severally set forth below. The said interrogatories and answers are, respectively, as follows, to-wit:

"1. Is the Elochoman river, above the lands of Thomas Dorris, a highway suitable for the running of logs? Answer: Yes.

"2. Have the lands of Thomas Dorris been injured by the jam of November, 1897? Answer: Yes.

"3. Was that jam the result of the want of ordinary care and prudence on the part of the plaintiffs? Answer: Yes.

"4. What amount of land was damaged, and what is the value thereof? Answer: 2.62½ acres; \$168.75.

"5. Did the defendant Thomas Dorris refuse at any time before the jam was broken to allow the plaintiffs or their agents to enter upon and break said jam, and, if so, what was the extent and value of the land damaged at the time of such refusal? Answer: No."

Assignments of error as to the court's instructions to the jury are urged by counsel upon both sides, but we think the instructions substantially embody the law of the case. The court followed the findings of the jury upon the facts submitted to them, and thereafter, with other findings, entered the following findings of facts:

"3. That the Elochoman creek is about 18 miles in length, and empties into the Columbia river; that it has an average width of 100 feet, and a depth of about three feet; that in its normal capacity it cannot be used for the

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floating of logs, but that there are annually recurring freshets of sufficient duration and with a sufficient volume of water to render said creek capable of being used profitably for the floating of logs to the Columbia river to market; that said creek has been so profitably used for a period covering the last twenty-five years.

"4. That the said Elochoman creek is an unmeandered stream unaffected by the rise and fall of the tide, save only for a short distance above the point where it empties into the Columbia river, and below the lands of said Thomas Dorris.

"5. That the lands of plaintiff hereinbefore described are chiefly valuable for their timber, and that there is no other outlet to market, except by means of said Elochoman creek, where the same flows through the lands of said Thomas Dorris.

"6. That, in addition to the lands of plaintiffs, there are large bodies of timber adjacent to said Elochoman creek, which are heavily timbered, and that the timber thereon can not be conveyed to market except by means of said creek.

"7. That during the early part of November, 1897, the plaintiffs, having theretofore placed in said creek a large number of logs, to-wit, to the number of about 1,500, undertook, during a freshet, to run said logs down said Elochoman creek, where the same passes through the lands of said Thomas Dorris.

"8. That at the time the plaintiffs so undertook to run said logs there was upon the banks of said stream, adjacent to and forming a part of the bank of said stream where the same passes through the land of said Thomas Dorris, a large rock, which had theretofore been embedded in the bank, but which during frequent freshets had partially washed out from the bank; that said rock was so situated at the time said logs were run that the accumulation there at any one time during a freshet, of a great volume of logs, would result in a jam, and the consequent spreading out of the water upon the neighboring lands, with damage resulting therefrom; that the fact that the above described rock was situated as aforesaid, and that the floating of a

large number of logs thereupon would result in the formation of a jam, was well known to plaintiffs before the running of said logs aforesaid.

"9. That during the early part of the said month of November, 1897, the said plaintiffs caused to be turned loose in said creek, at a point above the lands of said Thomas Dorris, about 1,500 sawlogs, many of them of considerable size and length, which said logs were, by the freshet then occurring, carried down to the said rock, situated on the lands of Thomas Dorris; that there a jam was formed and the waters of said creek were backed and caused to overflow upon the lands of Thomas Dorris, occasioning damage thereto in the sum of \$166.75.

"10. That the said damage as aforesaid resulted from the carelessness and negligence of the plaintiffs."

Upon the facts as found the following conclusions of law were entered:

"1. That the Elochoman creek, from the point where the same empties into the Columbia river, up to the lands of plaintiffs, is navigable for logs at sufficiently regularly recurring periods and for sufficient lengths of time to enable the same to be used profitably for the floating of sawlogs to market.

"2. That the public have a right to the use of said stream for the purpose of floating sawlogs and other products of the forest to market, provided that said use be exercised with such reasonable care as will not endanger the property of the riparian proprietors.

"3. That the plaintiffs are indebted to the defendant Thomas Dorris in the sum of \$166.75, his damages so as aforesaid sustained."

It is contended that some of the important findings are not justified by the evidence, but an examination of the evidence convinces us that there was evidence upon which to found the findings; and, since the trial court heard all the evidence, we believe he is better qualified than this court to pass upon its weight and credibility. We find no error in the conclusions of law.

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Decree was entered, in accordance with the findings and conclusions, that the Elochoman creek, from the point where it empties into the Columbia river up to and through the lands of Thomas Dorris, and up to and through the lands of plaintiffs, is navigable for logs and other products of the forest; that the public have a right to use said Elochoman creek for the purpose of floating sawlogs and other products of the forest to market, provided that said use be exercised with such reasonable care as will not endanger the property of riparian proprietors. The said Thomas Dorris was awarded damages in the sum of \$166.75, together with his costs, and said William Dorris was awarded his costs. The temporary injunction theretofore issued against Thomas Dorris and William Dorris was dissolved.

The complaint of Thomas Dorris, on his appeal, that the court erred in the matter of granting and continuing the temporary injunction heretofore referred to in this opinion, we think, calls for no consideration here. If the court below committed error, this court cannot now reverse its proceedings in the matter of the temporary injunction, for the reason that any such error was corrected by the court itself when it dissolved the temporary injunction at the final hearing. If harm occurred by reason of the temporary injunction, the remedy is now by suit upon the injunction bond for wrongfully suing out the injunction.

The real question to be determined upon the merits is, What are the respective rights of the land owner and the log driver upon a stream of the character of Elochoman creek? The act of March 17, 1890 (Session Laws of 1889-90, p. 470; Bal. Code, §§ 4378-4386, inclusive), defines the powers and duties of corporations organized for the purpose of building booms and catching logs and timber products therein. Section 9 of said act provides:

"All meandered rivers, meandered sloughs and navigable waters in this state shall be deemed as public highways, and said corporations shall be declared public corporations for the purpose of this act; and the improvement of such streams, sloughs and waters shall be deemed and declared a public use and benefit."

Under this section all "*meandered rivers and meandered sloughs*" shall be deemed as public highways for the purposes specified in the act, viz., booming and floating logs and timber. Nothing further is needed to establish them as such public highways, when it is shown that they are meandered. The section further provides that all "*navigable waters*" shall be deemed as public highways for the same purpose. If the stream is not meandered, it must then be determined whether it is or is not navigable in fact for floating logs or timber. If navigable for such purpose, it is a public highway for that purpose. The court finds Elochoman creek to be a short stream, eighteen miles in length, with an average width of one hundred feet, and a depth of about three feet, and that the stream can, during annually recurring freshets, be used profitably for the floating of logs to the Columbia river to market, and that it has been so profitably used for the last twenty-five years. The stream must therefore be held to be a public highway for the purpose of floating logs and timber to market. Being a public highway for such purpose, what are the relations of the land owner to the stream? Thomas Dorris is the owner of the land on both sides of the stream. If such a stream as this is included in the provisions of § 1, art. 17, of the constitution of Washington, then the state is the owner of the bed of the stream below ordinary high water mark. We do not believe, however, that the said constitutional provision was intended to include streams of the character of this one, but only such as are navigable for general commercial purposes. This stream

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is of such a character that its use as a public highway is restricted to one purpose, viz., that the floating logs or timber; and we think a distinction must be drawn between such streams and those which are highways for general trade and commerce. The title to the bed of the stream, therefore, passed from the government to the land owner, but it is subject to the right of the public to use the stream for floating logs and timber. This right is further given by virtue of the act of 1890 aforesaid to corporations, under conditions therein contained. Again, the same right is continued with further provisions under the act of March 18, 1895 (Session Laws 1895, p. 128; Bal. Code, §§ 4387-4394). These provisions have been held constitutional by this court in *East Hoquiam Boom & Logging Co. v. Neeson*, 20 Wash. 142 (54 Pac. 1001). With this right given to a corporation to use the stream as a public highway, there is no reason, in principle, why an individual or partnership, as in this case, may not use it as such. Indeed, if a corporation only could so use the stream, the act would be of doubtful force, because of its discrimination. The statute provides how such corporations may improve the stream, by removing obstructions, and they may also become common carriers to drive all the logs delivered into their charge, and may collect toll therefor. But the right of individuals or partnerships to use the stream as a highway cannot be denied. But neither such corporation nor individuals can interfere with the soil in a stream of the character of Elochoman creek, the bed of which is owned by the land owner, without the land owner's consent, or, by operation of law, with due compensation made. The same reasoning applies with even greater force to the use of the banks of the stream, as was sought to be done in this case. *Lownsdale v. Gray's Harbor Boom Co.*, 21 Wash. 542, 547 (58 Pac. 663).

Appellants, therefore, have the right to drive their logs down the stream as long as they do so without damage to the land owner. But, if the use of the freehold or shore rights are required, they must acquire them, either as individuals, or by condemnation in a corporate capacity, as provided by the statutes above mentioned. It having been found that the jam was caused by the appellants' careless manner of driving the logs, the consequent damage to the land is chargeable to them; and, since we find no substantial error in the record, the judgment is affirmed.

[No. 8287. Decided April 19, 1901.]

ANGELLETTA PACKER *et vir*, Respondents, v. THIRD STREET & SUBURBAN RAILWAY COMPANY, Appellant.

APPEAL — SUFFICIENCY OF EVIDENCE.

Where there is substantial evidence upon which to base a verdict, the verdict will not be disturbed on appeal on the ground of the insufficiency of the evidence.

Appeal from Superior Court, King County.—Hon. ORANGE JACOBS, Judge. Affirmed.

Bausman, Kelleher & Emory, for appellant.

Upton, Arthur & Wheeler, for respondents.

PER CURIAM.—This action was brought by respondents in the superior court of King county to recover damages for personal injuries said to have been received by respondent Angelletta Packer while riding in one of the cars of the appellant company. Her husband and correspondent, George N. Packer, was made a co-plaintiff in the action. The complaint avers that the appellant company is the owner and manager of an electric street railway

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in the city of Seattle, known as the Third Street and Suburban Railway, and that on the 10th day of October, 1897, said company received said respondent Angelletta Packer as a passenger in one of its cars, to be transported as such passenger from a point on Third avenue to Ravenna Park in said city, and accepted from her the usual and customary fare for such transportation; that while being thus transported the said car was proceeding over its track along Howard avenue upon a down grade, at the foot of which was a sharp curve; that by reason of the negligent and careless manner of running said car, and by reason of the failure to provide a suitable track and guard rail upon and against which the car should run, it was, at the point where it struck said curve, thrown off the track and down an embankment, resulting in injuries to said respondent, for which she claims she is damaged in the sum of \$3,000, and in further small sums for expenditures for medicines and physicians services, and prays judgment for \$3,023. The answer is a general denial of the material allegations of the complaint. A trial was had, the cause submitted to a jury, and a verdict returned against the appellant in the sum of \$750. A motion by appellant for a new trial was overruled, judgment entered upon the verdict for respondents, and appellant has appealed from said judgment.

The only assignments of error are the following: (1) The court erred in not granting a new trial for the reason that the damages were excessive; (2) the court erred in refusing a new trial for the reason that the evidence failed to justify the verdict, in this: that there was no proof that any of the injuries alleged in the complaint had resulted from the accident, and all the proof in regard to them was a denial of this; (3) the court erred in not reducing the damages because the same were

excessive. Where there is substantial evidence upon which to base a verdict, this court will not set it aside on the ground alone of insufficiency of the evidence. An examination of the evidence in this case satisfies us that there was evidence upon which to found a verdict. We do not think the record presents such a case as would justify us in saying that the damages found by the jury were excessive.

The judgment is affirmed.

[No. 3523. Decided April 20, 1901.]

ALLEN MILLER, *Respondent*, v. J. H. DUMON, *Appellant*.

APPEAL — SUFFICIENCY OF EVIDENCE.

Where the evidence is contradictory, but there is substantial testimony supporting the verdict of the jury, the verdict will not be disturbed on appeal, even though the court may believe that the weight of the testimony is against it.

EVIDENCE — OPINIONS OF EXPERT.

Where a witness has qualified as a physician and surgeon, familiar with fractures and with the X-ray process of determining the existence of a fracture, he is competent to testify as to his opinion as to an alleged fracture of plaintiff's leg, based upon an X-ray negative of the injured limb taken by himself.

SAME — X-RAY PHOTOGRAPHS.

An X-ray photograph is admissible in evidence, when verified by proof that it is a true representation of an object which is the subject of inquiry.

MISCONDUCT OF JUDGE — COMMENT ON FACTS.

A remark by the judge that every doctor examined seemed to locate the external capsular ligament in a different place, and he would like to see in a surgical work, just where that ligament is, and would like an exact description of it, does not fall within the prohibition of art. 4, § 16, of the constitution against commenting on the facts, since the remark amounts to nothing more than an expression of the judge's inability to un-

24	648
30	84
24	648
37	542

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derstand, from the description given by the medical witnesses, the exact location of that ligament, made with the object of calling the attention of counsel to the difficulty felt by him, so as to have the matter made clearer to judge and jury.

INSTRUCTIONS — INTERPRETATION AS A WHOLE — HARMLESS ERROR.

Although an instruction, standing alone, may have had a tendency to mislead the jury, yet it would not constitute prejudicial error, when it is apparent, from the instructions as a whole, and in the light of their verdict, that the jury could not have been misled.

SAME — REFUSAL OF REQUESTED INSTRUCTION.

The refusal to give a requested instruction upon defendant's theory of the case is not prejudicial error, when that point is sufficiently covered by the instructions given by the court.

NEW TRIAL — REFUSAL WHEN JUDGE DOUBTS VERDICT — DISCRETION OF COURT.

A mere doubt as to the correctness of a verdict, expressed by the judge at the hearing of a motion for a new trial, is not ground for reversal by an appellate court of his action in refusing to grant the new trial.

Appeal from Superior Court, Lewis County.—Hon. HENRY S. ELLIOTT, Judge. Affirmed

A. E. Rice, George Dysart and M. A. Langhorne, for appellant.

J. B. Landrum and Reynolds & Stewart, for respondent.

The opinion of the court was delivered by

FULLERTON, J.—The respondent brought this action against the appellant, who is a physician and surgeon, to recover for injuries alleged to have been caused him by the appellant's negligent treatment of an injury from which he was suffering. The undisputed evidence shows that the respondent met with an accident early in July, 1896, which a Dr. Francis, who was employed by respondent to attend him, pronounced a fracture of the tibia of the left leg; that Dr. Francis treated the injured limb as for

a fracture until some ten or twelve days later, when the appellant was called in to examine the injury; that the appellant responded to the call, made an examination of the injury, and told the respondent that there was no fracture of the bones of the leg, but that he was suffering from a severe sprain. As to what further occurred during this visit there is a square contradiction in the evidence. The respondent's testimony is to the effect that the appellant undertook to treat the injury, stating that the treatment prescribed by Dr. Francis was improper, and liable to result in a permanent stiffening of the knee joint; that he unwound the bandages from around the limb which had been put on by Dr. Francis, removed the splint in which it was encased, and directed the respondent to get up and put on his clothes, assisting him in so doing; that he directed him further to get a pair of crutches, and come over to his office, when he would put a rubber bandage on the knee. The appellant denies that he undertook to treat the injury. While he admits that he examined the leg at the respondent's request, and expressed the opinion that no bones were fractured, he testifies that there were no bandages on the leg when he examined it; that he said nothing concerning the treatment prescribed by Dr. Francis, gave no advice as to its proper treatment, but told the respondent to continue under the treatment of Dr. Francis; telling him also that he would not undertake the case, and giving at the same time his reasons for refusing. It is undisputed, however, that as a result of this visit the respondent sent a note to Dr. Francis telling him he did not require his services longer; that he did get out of bed, and put on his clothes, did procure a pair of crutches, and undertake to use the injured limb, and that while so doing the leg gave way in some manner, causing the appellant much pain and suffering, and compelling

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him to retake to his bed. The appellant also testifies that on retaking to his bed he sent for the appellant, who for some reason, did not answer the call; that he then sent for Dr. Francis, who treated the case until treatment was no longer beneficial. The final result of the whole matter was a permanent injury to respondent's leg. Other matters of evidence material to be considered will be stated further on. The trial resulted in a verdict and judgment for the respondent.

The court charged the jury that under the issues as made by the pleadings there could be no recovery on the part of the respondent unless the jury should find from the evidence that the respondent's leg was in fact broken. The appellant urges that this instruction, whether right or wrong, became the law of the case, which the jury were bound to obey, and that the overwhelming weight of the evidence was to the effect that the leg had not been broken. We are asked to reverse the case and grant a new trial on this ground. On this question it may be that the weight of the professional testimony was to the effect that there had been no fracture of the bones of the injured limb, but the evidence was contradictory. There was substantial testimony the other way, sufficient of itself to support the verdict of the jury. In such a case, as we have repeatedly held, it is not within the province of this court to overrule the verdict, but it must stand, even though we may believe that the weight of the testimony is against it. *Pronger v. Old National Bank*, 20 Wash. 618 (56 Pac. 391), and cases there cited.

In the progress of the trial one Dr. Kibbe was examined as a witness, and was permitted, over the appellant's objection, to exhibit to the jury an X-ray negative taken by himself of the respondent's injured limb, and to testify that, in his opinion, based upon his examination made in

this manner, the tibia of the leg had been fractured at a place a little below the knee joint. The negative was also permitted to go to the jury. The appellant assigns error on the ruling of the court permitting the witness to testify as to his opinion, and permitting the negative to be introduced in evidence. It is argued that the witness, instead of being permitted to express the opinion that the bone of the leg had been fractured, should have been confined to explaining what appearances upon the negative indicated a fracture, and leave it for the jury to determine from the negative whether these appearances were there or not. But counsel, it would seem, have overlooked the fact that the witness qualified as a physician and surgeon, not only familiar with fractures, but with the X-ray process of determining whether a fracture had ever existed. As an expert he was as much qualified to express his opinion from an examination made in this way as were the experts called by the appellant, who made their examinations by means more commonly used by the medical profession. The method of examination did not affect the competency of his testimony. How much it affected its weight was entirely a question for the jury. Nor do we think the introduction of the negative itself was objectionable. The process by which it was obtained was fully explained to the court. It was shown to be taken by an approved process and an approved apparatus, and the witness testified that it was a correct representation of the condition of the bones of the leg. Photographs taken by the common processes are generally held admissible as evidence, and there would seem to be no reason for making a distinction between an X-ray and a common photograph; that is, either is admissible as evidence when verified by proof that it is a true representation of an object which is the subject of inquiry. For cases directly in point, see

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Bruce v. Beall, 99 Tenn. 303 (41 S. W. 445); *De Forge v. New York, N. H. & H. R. R.*, 59 N. E. 669.

The record shows the following:

“Q. Will you just define that external capsular ligament?”

A. The external capsular ligament extends from the rough surface of the outer part of the condyle of the femur and this ridge which you see (indicating on identification 1) around the upper part of the tibia. The ligament extends all around.

The Court: It seems to me every doctor has located that in a different place. I would like to see, in a surgical work, just where that ligament is; and I think the jury would like to see. I do not want to introduce surgical works myself, if counsel do not want them, but I would like to have an exact description of this.

Q. Since that point has been made prominent, I will ask you, doctor, to state now whether that capsular ligament there surrounds the entire knee?

A. Surrounds the entire knee joint; yes, sir.” (Then follows a minute description by the witness of the location and the uses of the capsular ligament.)

This remark of the judge is objected to as being a comment on the facts, and as being thus within the prohibition of § 16, art. 4, of the state constitution. While the judge's language might have been more happy, the remark, it seems to us, was nothing more than an expression of his inability to understand, from the description given by the medical witnesses, the exact location of the particular ligament inquired of, and his fear that the jury were being no better enlightened. His object was simply to call the attention of counsel to the difficulty felt by him, and to enable them to make the matter clear. Such an observation is not a comment on the facts. But even if we mistake in this, it cannot be that every remark that the judge may make during the progress of the trial touching the evidence is such a comment as will work a reversal, no mat-

ter which party may assign it as error. It must be such a comment as will operate to the prejudice of the complaining party before it falls within the constitutional inhibition. The rule is that error, to work reversal, must be prejudicial; and in the matter complained of here we see nothing that could in any way have prejudiced the appellant's case.

The court gave to the jury the following instruction:

"If you find, under the evidence, that the plaintiff is entitled to recover, it will be your duty to assess the amount of damages which, in your judgment, he should recover under the evidence in the case. In estimating this amount you may take into consideration the loss of time occasioned by the immediate effect of the injury complained of. You may further take into consideration the physical and mental suffering occasioned by the injury. In addition you may consider the occupation of the plaintiff, and his ability to earn money; and he will be entitled to recover for any permanent reduction in his power to earn money by reason of his injuries. The amounts of these several elements of damages, if any you find, are entirely within your province, having due regard to the obligation of your oath and the duty of reasonable action on your part under that oath. You will, however, bear in mind, gentlemen, that, whatever you may find on the question of damages, you can give no damages for any loss of time or pain or suffering of the plaintiff prior to the time the plaintiff was attended by the defendant, if you find he was so attended. The damages, if any you find, cannot, in all, exceed the sum of seven thousand dollars."

It is urged against this that it is not sufficiently explicit; that, while it may be a correct statement of the law, it was liable to be misunderstood by the jury; that the phrase "injuries complained of" is broad enough to include all of the injuries received by the respondent,—not only those caused by the act of the appellant, but the original injury, for which the appellant is not responsible.

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Standing alone, the instruction might be subject to the criticism put upon it, but in a previous instruction the court had defined to the jury the injuries for which the appellant was liable, if liable at all. He had instructed them that the injuries complained of were the "unskillful and negligent treatment" of respondent by the appellant. It would hardly seem, from the instructions as a whole, that the jury could have been misled, nor does their very moderate verdict so indicate.

It is said that the court did not, in his instructions, submit to the jury the appellant's theory of the case,—that is, did not direct their attention to the fact that the appellant contended that he had never undertaken to treat the injured limb,—and the refusal to give a requested instruction to that effect is assigned as error. On this point the court instructed the jury that, in order for the respondent to recover, they must be satisfied by a preponderance of the evidence that the respondent's leg was in fact broken, and that the appellant, acting as a physician and surgeon, unskillfully and negligently treated the broken leg; and further on gave the following:

"The court instructs you that the fact that a physician responds to a call for his professional services does not necessarily constitute an employment, unless some act is done or advice given by the physician which indicates an intention on his part to enter upon the employment. He may absolutely refuse this employment, if he sees fit. But when any act is done, or advice given, that may reasonably be construed into indicating an active entering upon the employment, then the liability of the physician attaches, and he may be held responsible for his negligence or lack of skill, as you are elsewhere herein instructed."

These instructions, we think, sufficiently covered the point.

At the hearing of a motion for a new trial, the trial

judge expressed his satisfaction with the verdict of the jury in all respects save upon the issue of the fractured bone. On this point he stated that his mind was in doubt, and that, before passing upon the motion, he intended to investigate the question further. Subsequently he overruled the motion, and his action is assigned as error. Counsel argue that, if the trial judge was in doubt from the evidence whether one of the substantial issues before the jury had been proven, it was his duty to grant a new trial at once, and that he had no right to look beyond the evidence for reasons to sustain the verdict. What investigation, if any, the trial judge made to satisfy his mind with reference to the justness of the verdict, the record does not disclose; but, if he overruled the motion while this doubt was still in his mind, it is not ground for reversal by an appellate court. Generally, where the record discloses that the trial court has expressed the opinion that the verdict is not sustained by the evidence, or is contrary to the weight of the evidence, and refuses to grant a new trial, the appellate court will reverse the judgment for an abuse of discretion (*Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288, 317, 47 Pac. 738, and cases cited); but it must appear that the trial judge had this opinion; it must appear that he believed that the verdict was clearly against the weight of the evidence. A mere doubt of the correctness of the verdict is not sufficient. Here the expression of the judge goes no further than to express a doubt upon this point, and in such a case it was his duty to uphold the verdict. *Kansas Pacific Ry. Co. v. Kunkel*, 17 Kan. 172. We have examined the entire record, and fail to find any substantial error.

The judgment is affirmed.

REAVIS, C. J., and DUNBAR and ANDERS, JJ., concur.

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Syllabus.

[No. 3581. Decided April 20, 1901.]

THE STATE OF WASHINGTON, *Respondent*, v. LOUIS ULSEMER, *Appellant*.

CRIMINAL LAW — CIRCULATING INDECENT PICTURE — SUFFICIENCY OF INFORMATION.

An information which alleges that defendant "knowingly" distributed a certain indecent picture sufficiently charges knowledge on his part of the indecency of the picture.

SAME — INSTRUCTIONS.

Where the information charged defendant with knowledge of the indecency of a picture circulated by him, an instruction by the court that "The sole questions for the jury to determine are, Did the defendant knowingly distribute the picture as charged in the information? and was this picture indecent?" are sufficiently specific as to the law of the case.

SAME — EVIDENCE OF USAGE.

In a prosecution for distributing an indecent picture, where the statute makes the jury the sole judges as to whether or not the matter circulated is obscene and indecent, testimony as to the use of similar pictures in commerce and trade is incompetent.

SAME — ACCUSED AS WITNESS — REMARKS OF COUNSEL.

Where a defendant charged with distributing an indecent picture offered himself and was sworn as a witness, but gave no testimony because the questions asked by his counsel were not admitted, it is not error for the prosecution to refer in argument to his offer to testify and make the comment that he made no denial of the indecency of the picture.

SAME — INSTRUCTIONS AS TO CREDIBILITY.

Where a defendant is sworn as a witness in his own behalf, it is not error for the court to charge that the testimony of the defendant should be weighed as that of any other witness, even though he did not testify because of the refusal to admit the testimony which his counsel endeavored to elicit and the denial of the right of cross examination on the part of the state.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Robertson & Miller, for appellant.

James Z. Moore, Prosecuting Attorney, *Miles Poindexter* and *Horace Kimball*, for the State.

The opinion of the court was delivered by

REAVIS, C. J.—Appellant was charged with having circulated an indecent picture in Spokane. The portion of the information material for consideration is as follows:

“That the said Louis Ulsemer, on the 2d day of August, A. D. 1899, in the county of Spokane, state of Washington, then and there being, did then and there unlawfully, feloniously, wilfully, knowingly, wickedly, and designedly distribute a certain indecent picture.”

Appellant entered a plea of not guilty to the information. No demurrer was interposed. At the trial a verdict of guilty was rendered. Motions for a new trial and in arrest of judgment were filed and overruled. Appellant objected to any testimony under the information, because it did not state facts sufficient to charge the crime of circulating an indecent picture. The contention is that the information is insufficient because it does not charge that appellant knew the matter distributed by him was indecent, and that such knowledge was an essential element of the offense. We are satisfied that the word “knowingly,” in the information, sufficiently charges knowledge of the indecency of the picture. This principle of construction has been determined by this court in *State v. Holedger*, 15 Wash. 443 (46 Pac. 652), and *State v. De Paoli*, ante, p. 71 (63 Pac. 1102).

The defendant offered himself as a witness and was sworn to testify. Several questions were propounded to him by his counsel, but, upon objection by counsel for the state, he was not permitted to answer them. Afterwards, in the course of the argument, counsel for the state mentioned the defendant's offer to testify, and that he did not deny knowledge of the indecency of the picture, and the

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court also instructed that the testimony of the defendant should be weighed as that of any other witness. This action of the court and counsel is assigned as error. The court had denied the right of the state to cross-examine the defendant. It was said in *State v. Duncan*, 7 Wash. 336 (35 Pac. 117): "When a defendant in a criminal case takes the witness stand, he assumes the character of a witness, . . . the same as any other witness." Defendant, in the language of the statute, "offered" himself as a witness and was sworn. The testimony which his counsel endeavored to elicit from him was not admitted, and, upon objection, no cross-examination was admitted. Defendant did not stand upon his rights, and refuse to offer himself as a witness. We do not perceive any reversible error or any prejudice in the instruction.

The court, among other instructions, used the words: "The sole questions for the jury to determine are, Did the defendant knowingly distribute the picture as charged in the information? and was this picture indecent?" to which exception is made by appellant. The instruction, though not as specific as it might be made, generally states the law. As we have seen, the information charged the defendant with knowledge of the indecency of the picture, and the court in the instruction advised the jury that such knowledge must be found as charged in the information.

The other instructions as to the nature of an indecent picture contain no error.

The testimony tendered by appellant as to the use of similar pictures in commerce and trade was incompetent. Any use of such pictures by anybody else would not palliate the offense of appellant. The statute provides (§ 7247, Bal. Code):

"The jury in all prosecutions under the next preceding section [which defines the crime] shall be the sole and

exclusive judges as to whether or not the matter circulated is obscene or indecent."

The judgment is affirmed.

FULLERTON, ANDERS and DUNBAR, JJ., concur.

[No. 3813. Decided April 20, 1901.]

JOSEPH W. SACKMAN *et al.*, Respondents, v. CHARLES L. THOMAS, Appellant.

REQUESTED FINDINGS — INCONSISTENCY.

The rule which declares it error for the court to make inconsistent findings has no application where a party to an action presents a request to the court in the alternative for two sets of findings, which are inconsistent in some particulars, for it is not objectionable to present findings covering different phases of the case which the testimony may support.

NOTICE OF APPEAL — PROOF OF SERVICE — SUFFICIENCY.

Under the statutes of this state governing appeals, it is unnecessary that proof of service of a notice of appeal should show where it was served, since service may, by statute, be made either within or without the state, and written admission of service is sufficient, without stating the place and manner of service, as is required in proof of service of summons.

EVIDENCE — TRANSACTIONS WITH DECEASED PERSON — ADMISSIBILITY.

Bal. Code, § 5991, which provides that no person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action, as a party thereto or otherwise, provided, that in an action or proceeding where the adverse party sues or defends as deriving right or title by, through, or from any deceased person, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with, or any statement made to him by, any such deceased person, has no application where the person offered as a witness was merely a party to the original contract with the deceased person, but is not a party to the suit, either directly or indirectly, and not bound in any way by the judgment in the particular proceedings in which the testimony of such witness is offered.

24	660
29	421
24	660
434	376
34	624
24	660
39	227

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SAME — COMMUNICATIONS BETWEEN HUSBAND AND WIFE — PRIVILEGED CHARACTER.

Semble, that Bal. Code, § 5994, which provides that neither a husband nor wife shall, during marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during marriage, is restricted to confidential communications, induced by the marital relation, and not to conversations relating to matters of business since it must be interpreted in conjunction with Bal. Code, §§ 4504, 4505, which provide that contracts may be made by a wife and liabilities incurred, and the same may be enforced by or against her, to the same extent and in the same manner as if she were unmarried, and actions may be instituted by one spouse against the other to establish whether the real estate conveyed to either is community or separate property.

SAME — OBJECTION TO ADMISSION OF HUSBAND'S DECLARATIONS — SUFFICIENCY.

An objection that transactions and conversations between husband and wife were inadmissible in evidence on the ground of being incompetent, irrelevant and immaterial, is insufficient to afford ground on appeal to urge the specific objection that the matters testified to were inadmissible as being privileged communications, which one spouse is forbidden, under Bal. Code, § 5994, to divulge without the consent of the other.

HUSBAND AND WIFE — SEPARATE CHARACTER OF PROPERTY — SUFFICIENCY OF EVIDENCE.

In an action where the issue was as to the community or separate ownership of real estate, the evidence was sufficient to establish the wife's separate ownership therein, when it appeared that her husband had declined to purchase the lots in dispute from a would-be vendor, but referred the vendor to his wife as having money to invest; that the wife bought the lots with \$1,000 in money given her by her son out of the proceeds of her former husband's estate and with \$700 given her by her then husband, and built thereon houses costing \$5,000 with money also given her by her husband; that the husband acquired considerable real estate after marriage, but this was the only parcel directly conveyed to the wife; that he always referred to it as her property and she dealt with the agents who had charge of it, receiving the rents herself and arranging for repairs.

Appeal from Superior Court, King County.—Hon. JESSE P. HOUSER, Judge. Reversed.

George E. de Steiguer, for appellant.

Patterson & Easly and *William L. Thompson*, for respondents.

PER CURIAM.—One Daniel J. Sackman, prior to the year 1867, was living at Tracyton, in Kitsap county, Washington, with an Indian woman, and by her he had children, among others the plaintiffs in this case. So far as the record shows, Daniel J. Sackman was never married before his marriage to Elizabeth W. Phillips. In July, 1864, said Sackman made a will, in which he acknowledged that the plaintiffs herein, naming them, were his children. This will does not appear to have been admitted to probate, but it was found among the papers of Daniel J. Sackman by his son Isaac shortly after Mr. Sackman's death, and has been in the custody of the plaintiffs ever since. About 1868 this Indian woman died, and afterwards, in 1877, Daniel J. Sackman married Elizabeth W. Phillips, who was, before her marriage to Sackman, the widow of one Phillips, and during this marriage, and while said Daniel J. Sackman and Elizabeth W. Sackman were living together as husband and wife, the real property in dispute was acquired. The grantee named in the deed was Elizabeth W. Sackman, and the grantors were Samuel L. Crawford and Charles Hilton, the first named being a witness in this suit. The consideration named in the deed was \$1,700. Shortly after this deed five dwelling houses, costing in all \$5,000, were built on the property. In 1889 Daniel J. Sackman died, leaving surviving him, as his sole and only heirs at law, his widow, Elizabeth W. Sackman, and his three sons, acknowledged by him in his will, the plaintiffs herein. Afterwards one Joseph Phillips, son of Elizabeth W. Sackman, was appointed administrator of Daniel J. Sackman's estate. The

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property in dispute was not mentioned in the inventory filed by him, either as the separate property of Elizabeth W. Sackman or as community property of Elizabeth and Daniel J. Sackman. On March 5, 1890, Elizabeth W. Sackman mortgaged the property to the Jarvis-Conklin Mortgage Trust Company, and the appellant claims title under this mortgage by sheriff's deed dated November 13, 1899, under a sheriff's sale of the date of June 30, 1898, in a foreclosure proceeding against Elizabeth W. Sackman and the Sackman-Phillips Investment Company, by appellant, as assignee of the mortgage to the Jarvis-Conklin Mortgage Trust Company. In 1891, and after this mortgage was given, the administrator of Daniel J. Sackman was discharged. In December, 1891, Elizabeth W. Sackman, after giving the mortgage to the Jarvis-Conklin Trust Company, conveyed the property in controversy, with a large lot of other real estate, to the Sackman-Phillips Investment Company, under a general warranty deed, in which no mention was made of the mortgage to the Jarvis-Conklin Mortgage Trust Company. There is evidence tending to show that in 1888, and prior to the death of Mr. Sackman, the rents were collected and given to Mrs. Sackman. There is no proof as to what was done with the rents, or who occupied the property during the time intervening between the death of Sackman, in 1889, and the discharge of the administrator, in 1891. Subsequently to 1891, Elizabeth W. Sackman and her grantees have collected and appropriated all rents. In January, 1899, the plaintiffs filed their complaint herein with the clerk of the superior court of King county, and later in the same month all of the defendants, excepting only the defendants Thomas, were personally served with summons herein, and on November 3, 1899, the defendants Thomas voluntarily appeared herein. In their

complaint the plaintiffs sought to have the property in dispute, viz., lots 2 and 3, in block 64, of Terry's Second addition, partitioned, and one-half allotted to them, and one-half to the Sackman-Phillips Investment Company. There was a prayer also for an accounting of the rents and profits for the five years preceding the filing of the complaint. There was also an allegation that at all times mentioned in the complaint the Sackman-Phillips Investment Company was the owner of one-half of the property, and that the other defendants claimed to have some lien, title, interest, claim or demand in the property, but that the interest of the plaintiffs in an undivided one-half was superior to such liens, claims, etc. To this complaint the defendants Thomas and wife answered, setting up six separate defenses: They denied the allegations of complaint; they alleged that they became the fee simple owners of all said property by virtue of foreclosure proceedings of the mortgage hereinbefore mentioned; they pleaded the statute of limitations; they pleaded that their title had been confirmed and quieted by paying taxes for seven consecutive years; they pleaded a lien on account of taxes and street improvement taxes paid; they pleaded that they had made improvements on the property amounting to \$1,000.

The court below found, as a conclusion of law from the facts, that the property was the community property of Daniel J. Sackman and Elizabeth W. Sackman, and not the separate property of Elizabeth W. Sackman; that the appellant was entitled to only an undivided one-half of the same, and that the plaintiffs were entitled to the other undivided half. The controversy is over the question whether the property was the community property of Daniel J. and Elizabeth W. Sackman or the separate property of Elizabeth W. Sackman. The respondents move the

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court to dismiss the appeal,—First, because this appeal and assignments of error are all based upon the insufficiency of the evidence to support the findings of fact and conclusions of law, and appellant has failed to request any findings or conclusions of law, such as he claims should have been found, and he has tendered and requested the court to make two entirely different and inconsistent findings, to-wit: one finding that the property is community property and one finding that it is separate property; second, because the proof of service of notice of appeal on respondents Sarah Sophia Thomas and Sackman-Philips Investment Company is insufficient, in that it fails to show the place where service is alleged to have been made.

This motion is based upon two grounds. The first is that the appellant has failed to request any findings of fact or conclusions of law such as he claims should have been found, and has tendered a request for inconsistent findings. In fact, the appellant did request such findings and conclusions as he claims should have been found. After the court had announced at the close of the trial its rulings on the admissibility of Mrs. Sackman's testimony, which had been received subject to objection, the appellant filed and presented to the court, and requested the court to sign, findings of facts as follows:

"That heretofore, to-wit: on or about the 21st day of March, 1883, S. L. Crawford and Charles Hilton sold and conveyed to Elizabeth W. Sackman those certain premises situated in King county, state of Washington, and particularly described as follows, to-wit: Lots 2 and 3, in block 64, in C. C. Terry's Second addition to the city of Seattle.

"That the said Elizabeth W. Sackman, at the time of so purchasing said property was a married woman, and the name of her husband was Daniel J. Sackman.

"That the price of said land paid by the said Elizabeth W. Sackman to the said Crawford and the said Hilton was the sum of seventeen hundred dollars (\$1,700).

"That of said purchase price, one thousand dollars (\$1,000) was a gift made to her by her son, William R. Phillips, and was her separate property.

"That of said purchase price the remaining seven hundred dollars (\$700) was a gift from her husband, Daniel J. Sackman, and was her separate property.

"That at the time of the conveyance of said property to the said Elizabeth W. Sackman, it was the intention of the said Daniel J. Sackman and Elizabeth W. Sackman that the same should be the separate property of the said Elizabeth W. Sackman.

"That after the conveyance of said property to the said Elizabeth W. Sackman, it was generally spoken of by the said Daniel J. Sackman and by him treated as the separate property of the said Elizabeth W. Sackman," etc.

These findings the court refused to make or sign, and exceptions were taken, after which the appellant further filed and presented to the court the following request:

"If the court finds that any portion of the purchase price paid by the defendant Elizabeth W. Sackman for the property described in this action was community property of herself and her husband, then the defendant Charles L. Thomas asks that the court find that One Thousand Dollars (\$1,000) thereof was paid for with her separate property which she derived from her son, William R. Phillips; that by reason thereof ten seventeenths (10-17) of said property then became her separate property, and that upon the death of her husband, she succeeded and became entitled to one-half of the remaining seven-seventeenths (7-17); and that the defendant Charles L. Thomas, by reason of his title derived from the said Elizabeth W. Sackman and the foreclosure proceedings against her, has succeeded to, and now is the owner of, the undivided thirteen and one-half seventeenths (13½-17), or twenty-seven-thirty-fourths (27-34), of said property.

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"The defendant Charles L. Thomas further asks the court that if the court finds the plaintiffs entitled to any interest in said property, then the court decrees that said interest is subject to a lien in favor of the said Charles L. Thomas for such proportion of the taxes and legal assessments paid upon said premises by the said Charles L. Thomas and Sackman-Phillips Investment Company, said payments so made being set forth in the fifth affirmative defense to the complaint, as said interest decreed to plaintiffs bears to the whole of said property."

Exceptions were also taken to the refusal of the court to make the last findings. There is certainly no inconsistency in these requests, and the authorities cited by the respondents upon this point have no application to this case. If the court had found as first requested, then it is evident the subsequent request would not have been tendered. The tender of the subsequent request was dependent upon the action of the court on the first request. The appellant had the right to consider the testimony in the alternative presented by the two sets of findings. If both findings so presented had been approved, then there would have been an inconsistency, and the authorities cited by the respondents would have been in point. The testimony might support either of the proposed findings. If the court had rejected the first and approved the last, the appellant would be bound thereby. The practice adopted in presenting findings to cover different phases of the case under the evidence is not objectionable, and the same reason does not apply as when the court makes inconsistent findings.

The second ground of the motion—the alleged insufficiency of proof of service of notice of appeal on respondent Sarah Sophia Thomas and the Sackman-Phillips Investment Company—is not well taken. The notice of appeal is not governed by the same law as the summons. "It

shall be served in the manner required by law for the service of papers in civil actions and proceedings." Bal. Code, § 6504. Written admission of the service is sufficient. Id., § 6503. This service is governed by §§ 4888 to 4892, Id., which sections are declared in terms, by § 4893, Id., not to be applicable to the service of a summons. There is good reason for requiring, as the statute does require, that the proof of service of summons should state the place served. In many cases service outside of the state would be void, and in any case cannot be made outside of the state, except on compliance with certain conditions. When jurisdiction of a party is once obtained, a different rule prevails, and § 4892, Id., provides that such service may be made either within or without the state. There is no law requiring proof of service of a notice of appeal to show where it was served, and when an attorney admits "due service and receipt of a copy thereof," as in this case, the admission is sufficient.

There is little conflict in the testimony, and, where questions of fact are to be determined, they turn, not upon the comparative credibility of witnesses, but upon the competency of testimony and the legal effect of the evidence. The negotiations leading up to the conveyance of the property in controversy in this action, and the circumstances surrounding the same, were as follows:

Mr. S. L. Crawford, now of the firm of Crawford & Conover, of Seattle, Washington, was, in the year 1883, engaged with Mr. Thomas W. Prosch in the business of publishing the Post-Intelligencer. Mr. Sackman had just bought from Mr. Prosch two lots on Ninth avenue, and Mr. Crawford, when at Port Blakeley, spoke to Sackman about selling him two lots owned by Mr. Crawford and Mr. Hilton on the same street. Mr. Sackman (to give a portion of Mr. Crawford's testimony verbatim), "said

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that he did not have any more money at that time to invest, but that Mrs. Sackman, or, to speak correctly, he always spoke of her as Auntie. He said, 'Auntie has some money that I think she would like to invest, and I think you had better go up to the house and see her.' And I went up to the house, and talked with her about the property and told her where it was, etc., and she subsequently bought the property and paid for it." Mr. Crawford's recollection was that Mrs. Sackman paid him \$500 of the purchase price at the time, and sent him the balance of the money later. Some time after the purchase of the property there was erected thereon five tenement houses. Mrs. Sackman testified that the money necessary for the building of these houses was given to her by her husband. There was no other testimony as to where the money came from, nor upon what terms Mrs. Sackman procured it. The advice of one Edwards, a real estate agent, was taken about securing the contractors, etc., and both Mr. and Mrs. Sackman talked about the houses, planning and arranging them, and during these consultations Mr. Sackman referred to it as Mrs. Sackman's property. After the construction of these buildings the property was in charge of several agents, who collected the rents, paid the taxes, arranged for repairs, etc. To one of these agents, J. W. Edwards, Mr. Sackman repeatedly spoke of the property as Mrs. Sackman's property. During the years 1885 and 1886 little could be realized from the rentals of the houses, and Mr. Sackman, in speaking to Edwards about the matter, stated that "she had made a poor investment." While Mr. Edwards had no personal knowledge of where the money that paid for the property came from, nevertheless, upon cross-examination by plaintiff's counsel, he testified that, from the conduct of the parties, their statements, etc., he believed it was intended to be the prop-

erty of Mrs. Sackman. Edmund Bowden, in the year 1888, was in Mr. Edwards' office, and attended to the collection of rents, etc. He testified that he collected the rents of this particular property, "supposedly for Mrs. Sackman." The houses were called Mrs. Sackman's houses, and were supposed to be hers. He remembered making several reports on the property, and receiving replies from Mrs. Sackman, in regard to the plumbing and one thing and another. Fred E. Sander, of Seattle, also handled the property. He testified that he was handling the property for Mrs. Sackman, and had repeated conversations with her about the same; that he talked very little with Mr. Sackman upon the subject; when he did, Mr. Sackman would refer him to his wife. Mr. Sackman told Mr. Sander that it was his wife's property. He stated to Sander, referring to this property, that his wife had made an investment that did not pay, and he could "give her the horse laugh." A portion of his testimony, upon cross-examination, is as follows:

"A. For quite a while we were not getting any rent, that is, we would get tenants, and used to have to pay probably five or six dollars down for the month's rent, and then we would have to spend ten or fifteen dollars to get the tenants out, and he complained, and not only him, but Mrs. Sackman complained.

Q. He complained?

A. Yes, sir. He said that we weren't doing any better than the other agents. I told him that we could not rent them unless they were fixed up. Well, he said, 'Go and see my wife; it is her property, and let her do what she has a mind to. I can give her the horse laugh now.'"

Mr. Sander handled the property for several years, and the different agents mentioned had it in charge from the time of the construction of the buildings down to the death of Mr. Sackman. Mrs. Sackman testified, over ob-

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jections hereafter stated, that the rents of the property were received by her. There is no conflict in the evidence about any of the foregoing facts. There is only one point in the evidence which can in any manner avoid the inference to be derived from them; that is, that once Mr. Sackman pointed out five houses on Ninth street to Theodore O. Williams, and spoke as if they belonged to him (Sackman); and to quote the witness's testimony:

"He went up to show me some houses,—his houses; he told me he had built five houses on two lots, and I went up and looked at them, and at that time he thought it was not a very fair investment, because he had poor tenants, he told me."

This testimony was objected to. In the foregoing statement no reference is made, save as to the receipt of rent, to the evidence of Mrs. Sackman, which the court admitted subject to objections to any testimony given by her as to any personal transactions or conversations had with Mr. Daniel J. Sackman, her husband, on the ground that the same was irrelevant, incompetent, and immaterial under the statute, as the defendants claimed under her. Thereafter the court, when the trial closed, and at the time of announcing its decision, held her testimony incompetent, and struck out all of her testimony as to the source from which she got the money which she paid for the property, and held that her testimony was incompetent so far as it related to her negotiations for, and purchase of, the property; to which rulings due exception was taken. Her evidence is to the effect that of the \$1,700 paid by Mrs. Sackman for the property, \$1,000 was derived from the estate of Mrs. Sackman's first husband, Mr. Phillips. Mrs. Sackman testified that this \$1,000 was the proceeds of certain property belonging to her former husband, situated on the corner of Taylor and Sutter

streets, in San Francisco; that it was paid to her son William R. Phillips, and by him given to her. In this statement Mrs. Sackman is corroborated by her son William R. Phillips. Mrs. Sackman further testified that the remaining \$700, constituting the purchase price, was given to her by her husband for the express purpose of buying the property, and because he wanted her to have it for her own. She testified that he gave her the \$5,000 to build the five houses on the lots after she had purchased them. Mr. Sackman, when he was married to Mrs. Sackman, owned more than two thousand acres of land, and bought considerable real estate after his marriage, but he never had any property bought by him deeded to his wife.

Was the testimony of Mrs. Sackman admissible in its entirety? If so, the finding of the court below that this was the community property of herself and Daniel W. Sackman, and not her separate property, cannot be sustained; for she testifies positively that one thousand dollars of the purchase price was her own separate property, which she obtained as a gift from her son; that the remaining seven hundred dollars of the purchase price was a gift from her husband; that the money to build the houses on the property was also a gift from her husband; and in this testimony she is corroborated by other facts and circumstances in the case. Her testimony is not contradicted by any legitimate testimony or unanswerable inference. The respondents claim that she is disqualified from testifying, because she is a party in interest, and cannot, therefore, testify, under § 5991, Bal. Code, to conversations and transactions with her deceased husband. That section reads as follows:

“No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of

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the action, as a party thereto or otherwise; but such interest may be shown to affect his credibility: *Provided*, however, That in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen years, then a party in interest or to the record shall not be admitted to testify *in his own behalf* as to any transaction had by him with or any statement made to him by any such **deceased or insane person**, or by any such minor under the age of fourteen years: *Provided further*, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and who have no other or further interest in the action."

"The modern tendency, both of legislation and of decisions of courts, is to give as wide a scope as possible to the investigation of facts." *Holmes v. Goldsmith*, 147 U. S. 150 (13 Sup. Ct. 288).

Courts also hold that it would be going too far, on assumed propriety, to add a disqualification to a witness not specified in the statute. *Cochran v. Almack*, 39 Ohio St. 314; *Hildebrant v. Crawford*, 65 N. Y. 107. The statute in question, but for the proviso, declares that no person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action. The proviso provides for an exception to this general declaration. Now, it is a rule of construction that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being within the words, as well as within the reason, thereof. The supreme court of the

United States, speaking through Justice STORY, thus announces the rule:

“Passing from these considerations to another, which necessarily brings under review the second point of objection to the charge of the court below; we are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up any such exception, must establish it as being within the words as well as within the reason thereof.” *United States v. Dickson*, 15 Pet. 141.

With these general principles in view, let us analyze the proviso of § 5991, *supra*. If the words, “in his own behalf,” had been omitted from the proviso, the contention of the respondents would be well founded. But from the section it is apparent that a party in interest may testify, but “not in his own behalf.” He certainly may testify against himself under this section. But when is a party said to testify in his own behalf? Is it when he testifies to a state of affairs that may collaterally or remotely affect his interest, or is it when he testifies to a state of affairs in a judicial proceeding in which his interest is bound by the proceedings? For instance, if he was a beneficiary in the action prosecuted by a trustee, although not a nominal party to the record, or if he had been required by notice to defend the action for the purpose of charging him as a principal on a promissory note, or under a covenant of warranty in a deed, so that the judgment in the action would be binding upon him, then he might be said to be testifying in his own behalf, although not a party to the record. Mrs. Sackman was not a necessary party to this action.

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No notice was given to her to defend it, nor had she undertaken to defend it. She was not a party to the action, but was merely called into the case as a witness, like any other witness. She had no right to introduce testimony in "her own behalf." She could not cross-examine witnesses. She was not bound by the actions of the parties or their attorneys in the case. She was not bound by any judgment rendered in the case, or any fact adjudicated in the case. She could not prosecute an appeal. How, then, could she be said to be testifying "in her own behalf?" *Anderson v. Bigelow*, 16 Wash. 198 (47 Pac. 426); *Cullity v. Dorf-fel*, 18 Wash. 122 (50 Pac. 932).

Margaret C. Wallace, as executrix of the estate of F. B. Wallace, brought an action against Moses Straus on these facts: Ferdinand Straus was indebted to her testator in his lifetime in the sum of \$11,500, for which he held certain railroad stock as collateral security. A new firm of F. B. Wallace & Co. was organized. Moses Straus agreed that, if this indebtedness was transferred to the new firm, he would guarantee her testator from any loss by reason of holding and carrying said railroad stock. Wallace, to whom the guaranty was made, died. The executrix served notice on Moses Straus, the defendant, and Ferdinand Straus, to take up and pay for the stock. They failed to do so. The stock was sold, the amount received was credited on the debt, and the suit was to recover the balance. The following is from the opinion of the court:

"The defendant called his brother, Ferdinand Straus, as a witness, and he was asked: 'Did you give any instructions (to Wallace) in November, 1881, with reference to a sale of these two blocks of stock?' and the question was objected to by the plaintiff's counsel on the ground that the witness being the principal debtor, and the action being against his surety, he was interested in the event of the action and was, therefore, incompetent to

testify to a personal transaction with the plaintiff's testator under section 829 of the Code. The court permitted the witness to answer 'yes or no,' and he answered 'yes.' This question was followed by one calling for the instructions given, and the objection being renewed, the court sustained it and excluded the testimony. It must be assumed, in the absence of any objection on that ground, that the testimony offered was material. It is certainly possible that instructions might have been given by Ferdinand Straus to Wallace, the disregard of which would furnish a defense, in whole or in part, to the action. The question, therefore, is whether the witness was interested in the event of the action, as upon this ground only could the question have been excluded under section 829. The test of the interest which disqualifies a witness not a party, under this section, is stated by CHURCH, Ch. J., in *Hobart v. Hobart* (62 N. Y. 80), in construing a corresponding section of the prior code, adopting substantially the language in 1 Greenleaf on Evidence (§ 390). He says: 'The true test of the interest of a witness is that he will either gain or lose by the *direct* legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest remote, uncertain or contingent.' The same rule was reiterated in *Nearpass v. Gilman* (104 N. Y. 507). The witness Ferdinand Straus was not interested within the rule. He was not bound by the judgment rendered against the surety. It is plain that the judgment would not determine his liability in an action subsequently brought by Wallace against him to recover the debt or in any way limit it, except that if collected it might operate as payment in full or *pro tanto* of the debt. So if the surety, having paid the judgment, should bring an action for reimbursement, the recovery against the surety would not fix the liability of the principal. The judgment against the surety would not be an adjudication as against Ferdinand Straus, that the surety had incurred any liability for which he was entitled to indemnity. It would be admissible to prove the fact of the judgment, and it would de-

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termine the amount of the liability over the primary debtor to the surety when his liability had been otherwise established. This conclusion results from the 'most obvious principle of justice, that no man ought to be bound by proceedings to which he was a stranger.' (1 Greenl. Ev. 522.) Ferdinand Straus was, within this principle, a stranger to the suit against the surety. He was not a party, nor, so far as it appears, was any notice given to him by the surety to defend the action, nor had he undertaken the defense. It may be assumed, from the fact that he was called as a witness, that he knew of the pendency of the suit. But before he could be bound by the judgment he must have been placed by the act of the surety in a situation calling upon him to assume the control of the action or to aid in its defense, as though a party, with the right to adduce testimony and to cross-examine witnesses, and to appeal from the judgment (1 Greenl. Ev. § 523). The bare fact that he was called as a witness by the surety, nothing else appearing, did not bind him by the result of the litigation. It will be found in the cases upon the subject that something more was necessary. There must be formal notice to defend or something tantamount to such notice, given by the surety, or the principal must have assumed the defense of the action, or aided in preparing the defense in order to bind him by the result. (*Barney v. Dewey*, 13 Johns. 224; *Brewster v. Countryman*, 12 Wend. 446; *Chicago v. Robbins*, 2 Black, 418; *Lovejoy v. Murray*, 3 Wall. 1.) In short, no fact determined against the surety in the action, or which might have been determined therein, would, under the circumstances disclosed, when the ruling in question was made, be available to, or would bind the witness in any subsequent action brought against him either by the surety or the creditor Wallace."

The court held that the proposed evidence, for the reasons given, was erroneously excluded. *Wallace v. Straus*, 113 N. Y. 238 (21 N. E. 66.) We quote from a Texas case,—*Stevens v. Masterson's Heirs*, 90 Tex. 417 (38 S. W. 293):

"Smith had never, in fact, been a party to the proceeding, because he had never been served with process nor did he voluntarily appear in this case. But it is claimed that he had notice of the pendency of the suit, and, being a warrantor, would be bound by the judgment, although not made a party by the pleadings, and therefore was disqualified to testify to the statements of T. W. Masterson, deceased, father of plaintiffs. A warrantor, although not made a party to the proceedings, may be notified by his warrantee of the pendency of a suit against him and called upon to defend that suit; and, if the notice be timely and definite and the warrantor fails to make the defense, a judgment will be conclusive upon him to show that his warrantee has been evicted by a paramount title. 2 Black on Judgments, § 567; 19 Am. & Eng. Enc. Law, 1012. No notice was given by McLeary to Smith to defend the title involved in this suit. On the contrary, McLeary, after taking steps indicating an intention to call upon his warrantor to defend the title, retracted and discharged him from the case. Under such circumstances the judgment rendered would not bind Smith in a subsequent action between McLeary and Smith.

"If it were held that mere knowledge on part of the warrantor that a suit was pending would make him party to that suit and bind him by the judgment and thus disqualify him as a witness, then no warrantor could testify in a case in which parties are disqualified, because in the very act of taking his evidence, whether by deposition or orally, he would receive information that the suit was pending and would thereby be disqualified under such rule. There was no error in admitting the evidence of Smith." *Anderson v. Bigelow, supra; Cullity v. Dorffel, supra.*

The law of Massachusetts provided that, where one of the original parties to the contract or cause of action in issue and on trial is dead, the other party shall not be admitted to testify in his own favor. The supreme court of Massachusetts, in construing this, said:

"At the trial the defendant objected to the competency of John W. Howland, who was produced as a witness by

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the plaintiff in his behalf, upon the ground that he was one of the parties to the contract or cause of action declared on in this suit. This objection was founded upon a misapprehension of the meaning of the proviso, 'that when one of the parties to the original contract or cause of action is dead, the other party shall not be permitted to testify in his own favor,' contained in the section of the statute making parties in civil actions and proceedings competent witnesses. Gen. Sts. c. 131, § 14. That proviso relates wholly to persons who are parties to the suit the issue arising in which is on trial, and not to others who were merely parties to the original contract. This is obvious from the consideration that the prohibition excludes those only from being witnesses, who might otherwise, under the general provision of the statute, testify in their own favor. They who are not parties to the suit, either directly or indirectly, must necessarily testify in favor of one or the other of those who are, and of course not in their own. Interest in its event does not operate as a disqualification. Gen. Sts. c. 131, § 13. Howland was not a party to this suit." *Jones v. Wolcott*, 15 Gray, 542.

The terms "in his own behalf," as used in our statute, and "in his own favor," in the Massachusetts statute, are synonymous. It seems to us that the principle deducible from reason and these authorities is that, where one's interest is not bound by the judgment in the particular proceedings in which he testifies, he cannot be said to be testifying "in his own behalf." The case of *Youngs v. Cunningham*, 57 Mich. 153 (23 N. W. 626), cited by respondents, holds that a party who has conveyed land by warranty deed, in an action of ejectment brought by his grantee against the heirs of one who had acquired title by adverse possession, cannot testify with respect to facts equally within the knowledge of the deceased. That court says:

"The witness had executed to plaintiff a warranty deed of the land in question. He was under covenant to sustain the title, and the suit was in effect his suit to try the title to the land. If not within the express letter he comes

within the meaning and spirit of the statute, and is precluded thereby from testifying to facts equally within the knowledge of the deceased."

The trial of the case at bar in no way involved the warranty of title given by Mrs. Sackman to the Sackman-Phillips Investment Company, for that company did not lose the property by reason of any defect in the title, but through the mortgage incumbrance, and Thomas held only under this mortgage. What the covenants of the mortgage were does not appear in this action, further than that the mortgagor was to pay the debt secured. In *O'Brien v. Weiler*, 140 N. Y. 281 (35 N. E. 587), cited by respondents, it was held:

"The restriction was not limited to an interested witness, called in his own behalf, but extends to all cases where it is sought to examine the witness in behalf of a party or person interested in the event, who derives title to the subject-matter of the action by assignment or otherwise from the witness as against the representatives or assignee of a deceased person. If it is claimed that the witness has divested himself of interest, it does not follow that he is thereby rendered competent. The test is to be sought in the legal effect of the instrument by means of which his interest was extinguished. It matters not by what name it is called; if it operates in law to vest in another party to the action, or in a person interested in its event, the title or interest which the witness formerly had, the prohibition remains if it is proposed to use the testimony of the witness in behalf of his successor in interest."

The New York statute (§ 829, Code of Civil Procedure), differs materially from our statute. That section is: "Upon the trial of an action . . . a party or person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title, by assignment or otherwise, shall not be examined as a witness in his own behalf or interest,

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or in behalf of the party succeeding to his title or interest," etc. Of course, under such a law as this, the rule contended for by appellant would not apply; but we should not inject these provisions into our statute by a judicial construction, for that is a matter of legislative policy, and not a function of the court.

The respondents claim that the decisions of this court sustain their views. In *Gilmore v. The H. W. Baker Co.*, 12 Wash. 468 (41 Pac. 124), where one H. W. Baker, the president of the defendant corporation, was asked concerning a conversation with one Kirkman, deceased, before the organization of the corporation, as to the modification of a contract of lease made with Baker, and to which the corporation succeeded by assignment from Baker, the court says:

"It appears from the record that the appellant corporation was organized on February 1, 1893; that the original lease to these premises was executed to H. W. Baker, and thereafter the same was assigned to Bacon & Baker and by them to H. W. Baker Co. and by H. W. Baker Co. to the corporation known as "The H. W. Baker Co.," the appellant.

"The conversation in question occurred before the appellant corporation was organized. It related to a transaction in which the witness was at that time the *real party in interest* and in which *the witness was representing himself*. The fact that the present corporation (appellant) succeeded to the business of Bacon & Baker and H. W. Baker Co., and that the witness became its president and one of its stockholders, did not remove the disability which the law imposes upon him as a party in interest. To hold otherwise would, for practical purposes, be to ignore the spirit of the statute, by permitting one, whom the law from considerations of public policy requires to remain silent as to any transaction had by him with a deceased person, to evade the statute and avoid the disability imposed by it and become an effective witness merely by assigning his interest in the subject-matter of the action,

or by forming a corporation in which he might be the president and only stockholder, and thus by indirection accomplish that which the law prohibits to be done. For this reason alone, we think the testimony was properly excluded, and we do not feel called upon to pass on the question of whether an officer of a corporation can be permitted to testify to a transaction with a deceased person, in a suit between such corporation and the representative of such deceased person."

In this case, notwithstanding the transfer, H. W. Baker was not only the president of the corporation, but he was a stockholder, and thus an interested party, and, in effect, was testifying in his own behalf. In *Thorne v. Joy*, 15 Wash. 83 (45 Pac. 642), the rule excluding the testimony was applied to one who had conveyed away his interest in the land, which was the subject-matter of the action, by a deed absolute on its face, but which was in reality only a mortgage, and where the witness, *for the purpose of rendering his testimony competent*, had executed a release of his right to redeem. The court, however, in that case, says: "In our opinion, the undisputed proof showed that said Anderson [witness] *was at the time of the trial interested in the result of the action adversely* to the representatives of said Sprague. . . . It follows that the court properly struck the testimony of said Isaac W. Anderson from the record, unless his release of his right to redeem made him a competent witness, and, *under the circumstances*, we think it did not." There this court held, in effect, that Anderson was testifying in his own behalf in the action, and, *under the circumstances*, his release was a sham. The fair inference from this case is that, if it had not been for the peculiar circumstances of the case, Anderson's testimony, if he had not been interested in the action itself so that his interest was bound by the judgment, would have been competent. We conclude that

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Mrs. Sackman's testimony was admissible touching all the facts she testified to.

The further objection to Mrs. Sackman's testimony is made by respondents that she cannot testify under subdivision one, § 5994, Bal. Code, which reads:

"A husband shall not be examined for or against his wife without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor shall either, during marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other."

Contracts may be made by a wife, and liabilities incurred, and the same may be enforced by or against her, to the same extent, and in the same manner, as if she were unmarried. Bal. Code, § 4504. Under our laws, the husband and wife may acquire separate real estate, or they may acquire community real estate. The conveyance of such property is generally evidenced by a deed conveying to one or the other of the spouses, and nothing appears therein to indicate the character of the estate. If the conveyance is made during coverture, the presumption arises that it is community property. This, however, is only a presumption, and may be overcome by evidence. Necessarily, this evidence, in most instances, is the knowledge of the husband or wife, of the facts touching the origin of the consideration. Actions may be instituted by one spouse against the other to establish whether the real estate conveyed to either is community or separate property. Bal. Code, § 4505. All actions affecting real estate must be prosecuted or defended in the name of the real party in interest. Says Jones in the Law of Evidence, § 765:

"Modern legislation has greatly enlarged the powers of

married women in respect to making contracts, the bringing of actions and in the control of their property and person. The right to make contracts, and to bring actions is, in some cases, a barren one, unless accompanied by the right to give testimony in its support; and it has been generally found necessary that those who are parties should be competent witnesses. The fact that married women are far less dependent, than formerly, upon the caprice of their husbands, in respect to their control of person, property and children, may, at least to some extent, remove the objection to the disclosure even of communications made during marriage. It may be conceded that there are objections to any policy which may compel husband and wife to appear in court in an attitude of hostility to each other. On the other hand, there are objections to arbitrary rules of evidence which suppress the truth in the administration of justice. In very many branches of the law of evidence, ancient rules excluding certain classes of testimony have been compelled to yield; and it would be by no means surprising, if, in the near future, the competency of husband and wife as witnesses would cease to be questioned, except as to those confidential communications with each other which are induced by the marital relation. Indeed, in England and in a few states, the rule has already been adopted that husband and wife are competent to testify for or against each other in civil actions as to all facts except confidential communications."

Should we not hold, in view of the legislation of this state as indicated, that this section should be confined to confidential communications only,—that is, such as are expressly made confidential, or are of a confidential nature, or are induced by the marital relations,—and not to ordinary conversations, relating to matters of business, in which either party had a right to engage, such as acquiring real estate separate from the other?

The appellant in his brief seems to concede that the objection to Mrs. Sackman's testimony was also made on the ground that it was a communication between husband and

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wife, under § 5994, *supra*. An examination of the record, however, discloses that the objection was as follows: "Mr. Patterson: If your honor please, the plaintiffs desire to object to any testimony given by this witness [Mrs. Sackman] as to any personal transactions or conversations had with Mr. Daniel J. Sackman, on the ground that the same is irrelevant, incompetent, and immaterial under the statute; these parties all claiming under her." It is plain that this objection went only to the grounds for exclusion, under § 5991, Bal. Code.

These questions were asked Mrs. Sackman:

"Whose money paid for that?"

"Objected to by plaintiffs as involving personal transactions with the deceased and as incompetent.

"Where did you get the rest of that money?"

"Mr. Patterson: I make the further objection that it involves a declaration had with the deceased, and any statement made to this witness by him would not be admissible.

"The Court: I think I will take her testimony, and then I will settle the question afterwards."

The court, after argument of counsel, took the cause under advisement, and on the first of June, 1900, rendered its decision. The record says:

"The court then announced its ruling upon plaintiffs' objection to witness Elizabeth W. Sackman, and ruled and decided that said testimony was incompetent, in so far as said witness testified as to what money she paid as the purchase price of the property involved in this action; that the testimony of said witness was incompetent to show where and from whom she got the money which she paid as the said purchase price, or any part thereof; and that the testimony of said witness was incompetent as to her negotiations for and purchase of said property; and ruled that said incompetent testimony, and none thereof, could be considered as a basis for the court's decision or findings herein."

This is all that appears in the record as to the objection to, and rulings of the court on, Mrs. Sackman's testimony. We have held that her testimony was competent. The specific objection that the matters testified to by her were privileged communications, under § 5994, *supra*, was not made in the court below, and, as far as the record shows, not even referred to. The right to testify might have been waived by the husband in his lifetime. When an objection under this section is made, it should be specifically on the grounds set forth in the section, and not that the testimony is incompetent, irrelevant, and immaterial. Under the objection made to the testimony in the court below, we are not required to pass upon the objection now urged in this court for the first time.

As to the testimony of Theo. O. Williams, to the effect that Mr. Sackman in his lifetime stated to Williams, that the property was his, this evidence was objected to by the appellant. The statement was not made in the presence of Mrs. Sackman or the appellant. It was a mere casual remark. It was wholly unconnected with any negotiations for the purchase of the property. If admissible at all, it is not of sufficient force to overcome the statements made by Mr. Sackman when dealing directly with others concerning the property.

The deed to Mrs. Sackman expresses a money consideration only, and this court has held that the presumption in such a case is that the property is community property, and that the deed, standing alone and uncontradicted by any evidence, amounts to a conclusive presumption that the subject-matter is common property. *Yesler v. Hochstetler*, 4 Wash. 350 (30 Pac. 398).

In the case of *Yesler v. Hochstetler*, *supra*, the court said:

"But the assertion of an exception merely requires the

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production of proof either that the conveyance was in fact a lawful gift, or that the consideration was furnished by husband or wife individually out of funds or property which he or she was entitled, under the law, to hold as separate property. Whatever satisfies the court or jury of the truth of one or the other of these probative facts, will authorize the finding of the ultimate fact that the subject of the conveyance was separate and not common property, and thus the presumption will be overcome."

Consider the testimony of Mr. Crawford as to the purchase of the property. Mr. Sackman, when Crawford asked him to buy the property, said that he did not have any money to invest, but that his wife had money which she would like to invest. The fair inference from this is that the money his wife had was her separate money, and that she wanted to invest it on her own account. In pursuance of the direction from the husband, Mr. Crawford went and talked with the wife, told her where the property was, and she subsequently bought it. She seems to have conducted all the negotiations for its purchase. This piece of evidence alone is sufficient to overcome the presumption that the consideration was furnished by the community. In speaking about the property to Mr. Edwards, it was repeatedly referred to by Mr. Sackman as being Mrs. Sackman's property. Mr. Sackman told Mr. Sander that the property belonged to his wife, and that she had made a poor investment. The rents were also paid to Mrs. Sackman, and she gave directions about repairs. When this testimony, about which there is no conflict, is supplemented by that of Mrs. Sackman and her son, showing that one thousand dollars of the purchase price was a gift from the son derived from the sale of property belonging to her former husband, and that the rest of the purchase price was a gift from Mr. Sackman, the mere presumption arising from the deed alone must give place to the facts established by the testimony. These facts convince us that it

was her separate property. When the fact is once established, that when the property was acquired it was separate property of the wife, the presumption will be, in absence of evidence to the contrary, that houses placed thereon, through money derived from the husband, are also the separate property of the wife. The testimony in this case shows that Mr. Sackman was the owner of a large amount of unincumbered property, that he was liberal in giving money to his wife, and, though he acquired a large amount of property after his marriage, the two lots in controversy were the only property conveyed to his wife. It is not unreasonable to presume, independent of the testimony of the wife, that the \$700, part of the purchase price, and the \$5,000 to build the houses on the lots, were a gift from the husband to the wife, and that a husband situated as Mr. Sackman was would make such a gift to his wife. As we have already said, the same kind of a deed is ordinarily used to convey separate and community property. There is no particular sanctity, such as claimed by respondents, attaching to the consideration expressed in a deed.

"The only effect of the consideration clause in a deed is to estop the grantor from alleging that it was executed without consideration and to prevent a resulting trust in the grantor. For every other purpose it may be varied or explained by parol proof." *Goodspeed v. Fuller*, 71 Am. Dec. 576; *Cardinal v. Hadley*, 35 Am. St. Rep. 492.

The supreme court of California on this point says:

"It is well settled in this court that if a husband purchase an estate and pay for it out of the common property, and cause it to be conveyed to the wife by a deed of bargain and sale, with the intent that it shall become her separate estate, the transaction will operate and be upheld as a gift from the husband to the wife (*Peck v. Brummagem*, 31 Cal. 440; *Dow v. Gould & Curry S. M. Co.*, id. 653; *Ingersoll v. Truebody*, 40 id. 603; *Woods v. Whitney*, 42 id. 359.)

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"The doctrine of these cases is, that, *prima facie*, property conveyed to the wife by a deed of bargain and sale is common property, but that it is competent for the wife to show by extrinsic proofs the true character of the transaction, on establishing which the deed will be held to operate as a conveyance to her of a separate estate. It is held that such proof does not contradict or vary the written instrument, except in so far as it explains the consideration, which it is always competent to do, even in an action at law." *Higgins v. Higgins*, 46 Cal. 259.

We hold that the evidence in this case clearly establishes that the property in controversy was the separate property of Elizabeth W. Sackman. For that reason we have not considered the questions raised by the pleadings as to limitations, laches, and estoppels, and as to the other points discussed in the briefs.

The judgment and decree of the court below is reversed and set aside. This action is remanded, with instructions to the court below to dismiss the same at the costs of the plaintiffs; appellant to recover his costs on this appeal.

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CLIFFORD HOWELLS *et ux.*, Respondents, v. NORTH AMERICAN TRANSPORTATION AND TRADING COMPANY, Appellant.

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PLEADING — BILL OF PARTICULARS — ACTION FOR PERSONAL INJURIES — DAMAGES.

In an action by husband and wife to recover damages for injuries received by the wife through defendant's negligence, an instruction which submits to the jury the question of compensation for the suffering endured by the wife is prejudicial error, where, under a bill of particulars filed by plaintiffs, the items of damages claimed under the complaint are restricted to medical attendance, medicines and supplies, and time in attending to, nursing, and caring for the wife.

SAME — STATEMENT VOLUNTARILY FURNISHED TO ADVERSE PARTY — EFFECT.

The fact that a bill of particulars furnished upon the oral request of counsel for the adverse party, was not filed before trial, nor referred to at the time of trial is immaterial, since parties voluntarily furnishing a statement of items under their claim for damages are bound by it as fully as though furnished under the order of the court.

TRIAL — FAILURE TO OBJECT TO TESTIMONY — ERRONEOUS INSTRUCTIONS — ESTOPPEL TO URGE ERROR.

In an action by husband and wife to recover for injuries to the wife, in which a bill of particulars restricted the damages to medical attendance, medicines and the husband's claim for services in attending upon his wife, although the complaint had alleged the pain and suffering of the wife, the fact that evidence of the wife's pain and suffering was admitted without objection by defendant would not estop it from urging objection to the error of the court in submitting to the jury the question of compensation for her pain and suffering, since such testimony was competent in support of the husband's claim for money expended and services made necessary by such suffering.

MEASURE OF DAMAGES — HUSBAND'S LOSS OF TIME NURSING WIFE.

Where a husband seeks to recover for his services in attending his wife on account of injuries received through defendant's negligence, the measure of his damages is not the amount of money he might have made if he had pursued his own vocation during the time he was so employed, but his damages would be measured by the value of the services of a competent nurse for the time the husband was so engaged.

Appeal from Superior Court, King County.—Hon. E. D. BENSON, Judge. Reversed.

Bausman, Kelleher & Emory, for appellant.

Allen & Allen, for respondents.

PER CURIAM.—This is an action for damages brought by respondents against appellant in the superior court of King county. The respondents are husband and wife, and the appellant, at the time of the injuries complained of, owned and was operating a line of steamers between the

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ports of Seattle, state of Washington, and Dawson City, Northwest Territory, by way of the port of St. Michaels, in Alaska. The respondents were transported as passengers to St. Michaels by the steamer Cleveland, one of the appellant's steamers, and at St. Michaels they were transferred to the steamer J. J. Healy, another of appellant's steamers. While on board the last-named steamer, the respondent Anna Gerow Howells fell through an open hatchway or hold in the cabin of said steamer, which it is alleged was carelessly and negligently left open by appellant, without protection by railing or guards, and with no light or lights in or about the same to give warning thereof. It is alleged that said respondent, without fault of her own, received injuries from said fall. The cause was tried by a jury, and a verdict returned for respondents in the sum of \$1,500. A motion for a new trial was overruled, and judgment was entered upon the verdict of the jury for the full amount thereof. From said judgment this appeal is prosecuted.

The assignments of error are as follows:

"(1) The court erred in refusing to grant a new trial on the ground that the verdict was excessive, or in not requiring plaintiffs to remit at least \$1,000. (2) The court erred in charging the jury that the plaintiffs should recover for Mrs. Howell's alleged suffering."

The seventh and eighth paragraphs of the complaint are as follows:

"(7) That by reason of said injuries the said plaintiff Anna Gerow Howells has been permanently injured, and did suffer and is constantly suffering from the effects of the said injuries, causing great pain and suffering, and these plaintiffs were compelled to pay a large sum of money for doctor's bills and medicines, to-wit, the sum of \$250, and whereby by reason of which this plaintiff Clifford Howells was compelled to and did incur large expense and outlay both of time and money in attending to and

nursing and caring for his said wife as aforesaid, whereby he was damaged in a large sum of money, to-wit, \$1,475.

"(8) That because of said injuries this plaintiff Clifford Howells was deprived of and lost the services of his said wife for a long period of time, to-wit, from the 11th day of September, 1897, to the 17th day of September, 1898, to the damage of the plaintiff in the sum of \$500."

The complaint then concludes with a prayer as follows:

"Wherefore plaintiffs demand judgment against the defendant in the sum of \$1,975, with interest and costs."

In the record we find the following statement of a bill of particulars:

"Come now the plaintiffs, by their attorneys, Allen & Allen, and, by stipulation of the parties, furnish this bill of particulars as to the damages herein under paragraph 7: Medical attendance, \$250; time in attending to, nursing, and caring for his said wife, \$1,200; medicines and supplies, \$75."

This purports to have been signed by respondents' attorneys, and, it is admitted, was delivered to counsel for appellant before the trial. By an inspection of the seventh paragraph of the complaint, above set out, it appears that the specific items of damage alleged are for expenditures for doctor's bills and medicines, and the additional item of expense and outlay both of time and money in nursing and caring for the wife by the husband. The aggregate claim of damage for these items is \$1,475. The eighth paragraph of the complaint is limited to damages for loss to the husband of the services of his wife in the sum of \$500. The aggregate of the claims for damage in the two paragraphs is \$1,975, and the demand for judgment is for that amount. Thus, while it appears from the complaint that the wife endured pain and suffering, yet no claim for damages is laid upon that ground, and counsel for respondents announced in open court at the

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beginning of the trial that they made no claim for permanent injuries. This analysis of the complaint is supported by the bill of particulars above set out. The items under paragraph 7 are specifically limited to "medical attendance," "time in attending to, nursing, and caring for his said wife," and "medicines and supplies." It is contended by counsel for respondents that the bill of particulars was furnished upon the oral request of appellant's counsel, was not filed before the trial, and was in no way referred to at the time of the trial. The fact that it was furnished upon the oral request of counsel we think is immaterial. Section 4930, Bal. Code, provides that "the court may in all cases order a bill of particulars of the claim of either party to be furnished." Manifestly appellant could have asked such order from the court in this case, and, if respondents voluntarily furnished a statement of items under their claims for damages, they are bound by them as fully as though furnished under the order of the court. The fact that the court's attention was not called to the bill of particulars at the time of the trial we should fairly consider in favor of the respondents, if there had been nothing else before the court to challenge its attention to the items for which damages were claimed. But, as we view the complaint itself, it is not susceptible of any other interpretation than that given to it by the bill of particulars. It must therefore be held that this complaint makes no claim for damages for pain and suffering. Upon this point the court, of its own motion, instructed the jury as follows:

"If you believe from a preponderance of the evidence in this case that the plaintiff Mrs. Howells received the injuries complained of through a failure of the defendant or its agents or its servants to take such precautions to maintain the hatchway or hole in question in a safe condition, as servants of steamboat companies generally exer-

cise upon boats carrying passengers under circumstances entirely similar to those surrounding these parties when the fall occurred, then you will find for the plaintiff in one such gross sum, not exceeding \$1,975, as will, in your opinion, from the evidence, justly compensate plaintiff for the suffering endured by Mrs. Howells. . . ."

It will thus be seen that the court squarely submitted to the jury the question of suffering, and left the jury to fix an amount of damage therefor. It is well understood that there is no criterion for fixing the amount of damages for mere pain and suffering, except the judgment of the jury trying the cause. It is an element of damage not susceptible of being estimated by direct proof. But other items of damage must be proven by competent and direct testimony. There was proof in this case directed to the items of damage covered by the complaint, upon which a verdict might have been founded. But it is impossible to know how much the jury included in the amount returned for suffering, which they were told by the court they should consider as an element of damage. We think this instruction of the court, under the complaint in this case, was material error. Respondents' counsel insist that appellant is not in position to take advantage of this error, for the reason that evidence was introduced showing that the wife had endured pain and suffering, and that this evidence was not objected to by appellant's counsel. We, however, agree with the theory of appellant's counsel that said testimony was competent and unobjectionable in support of the husband's claim for his services in attending upon his wife, in that evidence of the suffering tended to show the necessity for the services.

Appellant further contends that the husband can only recover for his services in attending his wife the value of the services of a competent nurse for the time the husband was so engaged, and that he cannot estimate his dam-

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Syllabus.

ages upon the basis of the amount of money he might have made if he had pursued his own vocation during the time he was so employed. We believe this to be a correct statement of the law. We find this principle so directly declared in the following cases: *Barnes v. Keene*, 132 N. Y. 13 (29 N. E. 1090); *Town of Salida v. McKinna*, 16 Colo. 523 (27 Pac. 810); *Hazard Powder Co. v. Volger*, 7 C. C. A. 130, 58 Fed. 152. Counsel for respondents seem to have tried this case upon the theory that the husband is entitled to recover upon the basis of the value of his lost time from his own business pursuits, and the evidence was directed to that end. We believe, however, that respondents' suggestion is well taken,—that, as appellant did not object to the testimony upon this point, and did not at the time except to this as a measure of damages, the objection now comes too late.

For the reasons first assigned, however, we think the court erred in overruling the motion for a new trial. The judgment is therefore reversed, and the cause remanded, with instructions to the court below to grant the motion for a new trial.

[No. 3630. Decided April 22, 1901.]

ELIZABETH N. BRIER, *Appellant*, v. TRADERS' NATIONAL BANK OF SPOKANE, *Respondent*.

JUDGMENTS — CESSATION OF LIEN — REVIVAL — RIGHTS OF INTERVENING PURCHASERS.

Under Code Proc., § 460, which provides that the real estate of a judgment debtor shall be held and bound to satisfy any judgment for the period of five years from the date of its rendition, and that the lien of the judgment on such real estate shall continue only five years, commencing from the date on which the judgment was rendered, and under § 463. *Id.*, which provides that a revived judgment shall be and continue a lien upon real

24	695
125	635
25	535
24	695
129	635
24	695
31	315
31	565
24	695
32	87
24	695
33	288
24	695
37	270
24	695
40	192

estate of a judgment debtor for a period of five years from and after the date of the order of revival, in like manner with the original judgment, but that no judgment should be revived unless proceedings therefor should be commenced within six years after the date of its rendition, the act of revival does not make the lien continuous, where application therefor is not made until after the expiration of the five years; and, where the lien has ceased, prior to the order of revival, it cannot be revived so as to affect the rights of a purchaser who had acquired title subsequent to the original judgment, but such after acquired title gains priority over the judgment during the interval between the cessation and revival of the judgment lien.

SAME — RES JUDICATA — MATTERS CONCLUDED.

An action seeking the foreclosure as a mortgage of a deed absolute on its face would not be barred on the ground of *res judicata* by the fact that, in a prior action between the same parties involving the same premises, the plaintiff herein being a subsequent grantee and defendant a prior judgment creditor, judgment had been rendered decreeing plaintiff's conveyance subject to the lien of the prior judgment, and authorizing the judgment creditor to sell on execution all of the interest of plaintiff's grantor in the premises, when the court in the prior action expressly found that the conveyance to the plaintiff in this action had been made subsequent to said judgment, but for a valuable consideration, and there was no finding or adjudication upon the question of the fraudulent character of the conveyance, though alleged and denied in the prior action, such issue not being material to the controversy therein.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Reversed.

Hamblen & Lund, for appellant.

Graves & Graves, for respondent.

The opinion of the court was delivered by

WHITE, J.—This is an action by the appellant, in which she alleges that on the 22d of April, 1891, George F., Carrie B. and Jacob Schorr, at Spokane Falls (now Spokane), made their note for \$1,975, payable to the order of one Henry M. Tilford, and, to secure the payment of

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this note, George F. and Carrie B. Schorr, who were husband and wife, made a mortgage to said Tilford on certain real property in Spokane, which is described at length in the complaint; that, on April 16, 1892, George F. Schorr became heavily involved and unable to pay the mortgage or interest due, and, being threatened with foreclosure, he solicited the appellant, who is the mother of Carrie B. Schorr, his wife, to purchase said note and mortgage and hold the same in her own right, so that, whatever reverses should come, said Schorr would not be compelled to vacate the premises by reason of the foreclosure of the mortgage; that the appellant, desirous of aiding and assisting her daughter and son-in-law, and unwilling that said mortgage should be foreclosed, entered into negotiations with Henry M. Tilford, owner of the note and mortgage, for the purchase of the same, with the result that, on April 16, 1892, or thereabouts, the appellant paid therefor to said Tilford the sum of \$2,250, which sum represented the principal and interest of said note at that time; that the appellant was of the age of sixty-eight years, and that at the time of the purchase of the note and mortgage she was accustomed to seek advice of relatives and friends with reference to matters of business, and upon the occasion referred to committed the consummation of said transaction to her son-in-law, the said George F. Schorr, who, upon advice of counsel, instead of procuring an assignment of said note and mortgage, caused to be executed and delivered by said Tilford a release thereof and placed the same upon record in the office of the auditor of Spokane county, on June 20, 1892; that none of the makers of said note, nor any one in their behalf, or at all, has paid said note and the mortgage, or any part thereof; that on November 18, 1891, George F. Schorr was indebted to Louise B. Stratton in the sum of \$1,800, and to Charles F. Schorr

in the sum of \$800; and that said George F. Schorr and his wife, for the benefit of Louise B. Stratton and Charles F. Schorr, and for the purpose of securing the payment of the sums due them, executed and delivered to Louise B. Stratton a mortgage upon the same property, which mortgage was recorded in the auditor's office of Spokane county; that the sums so last secured have not been paid; that on April 22, 1892, George F. and Carrie B. Schorr, having suffered great reverses and being reduced in property to the premises covered by said mortgages, desiring to protect and restore so far as possible the moneys due the appellant and Louise B. Stratton and Charles F. Schorr, and that each of said parties should share therein, obtained a release of the mortgages hereinbefore mentioned, and thereafter divided the premises described in said mortgages into three parts, and made, executed and delivered to the appellant an instrument in writing in the form of a warranty deed, but intended as security for the payment of said \$2,250, which she had paid to Tilford, by which instrument the said George F. and Carrie B. Schorr granted, bargained, sold, and conveyed unto the appellant certain property, being the property in controversy in this action; that this deed was executed, acknowledged, and filed in the auditor's office of Spokane county, the filing for record being on June 20, 1892; that at the same time said George F. and Carrie B. Schorr executed and delivered unto Louise B. Stratton, for the benefit of herself and Charles F. Schorr, an instrument in the form of a warranty deed, but intended as security for the payment of said \$1,800, on the remaining two-thirds of the property named in the mortgage, which deed was afterwards recorded in the auditor's office of Spokane county; that, at the time of the execution of said deed to the appellant, George F. Schorr represented to the appellant that the deed

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would be better security than a mortgage, and would avoid the necessity and expense of a foreclosure, and that the appellant, relying entirely upon the advice and counsel of the said Schorr in respect to this, received said deed and recorded the same; that at the time these deeds were made, and for a long time prior thereto, George F. Schorr and his wife resided upon the property and claimed the same as a homestead; that the Traders' National Bank of Spokane and the other defendants have, or claim to have, some interest or lien upon the premises described; that the interest or claim of the Traders' National Bank is by virtue of a judgment recovered in the superior court of Spokane county, and levy upon and sale of the premises under an execution on this judgment; but that such interest, lien, or claim is subsequent and inferior to the lien of the appellant. The complaint also alleges the payment of certain taxes from 1892 to 1895. The prayer for relief is that the release and satisfaction of the Tilford mortgage be canceled, set aside, and held for naught, and that the appellant be adjudged the owner of the same and the note secured thereby, and subrogated to the rights of Henry M. Tilford as they existed prior to the execution of said release and the recording of the same. There is also a prayer for judgment against George F. and Carrie B. Schorr on the Tilford note; that the property be sold to satisfy the same, and that all the defendants be forever barred and foreclosed of their rights in the premises; that, "if the foregoing relief shall be deemed inapplicable, then that the instrument, in form of a warranty deed, made, executed, and delivered to the plaintiff by George F. Schorr and Carrie B. Schorr, be adjudged and decreed to be a mortgage and the lien thereof paramount and superior to the rights, liens, and equities of any or of all of the defendants in the suit, or persons claiming under

them," etc.; and that said instrument, as a mortgage, be foreclosed and the proceeds applied to the payment of the sum found to be due appellant and secured thereby. There is also a prayer for general relief.

The Traders' National Bank, respondent, answered, setting up several defenses. The only one necessary to be considered, in view of the evidence and findings of fact, is that pleading a former adjudication of the rights of the appellant. This defense is, in effect, that on November 23, 1891, the respondent recovered judgment against George F. and Carrie B. Schorr in the superior court of Spokane county, in a suit therein pending against them; that a transcript of said judgment was on December 14, 1891, duly filed and recorded in the office of the auditor of said Spokane county; that on or about April 17, 1893, the respondent commenced a suit in the said superior court against George F. and Carrie B. Schorr and the appellant Elizabeth N. Brier. The allegations and prayer of the complaint in said suit were as follows:

"1. That it now is, and at all times in this complaint mentioned was, a corporation organized and existing under and by virtue of the national banking laws of the United States of America.

"2. That defendants George F. and Carrie B. Schorr now are, and at all times in this complaint mentioned were, husband and wife.

"3. That on the 23d day of November, 1891, the plaintiff recovered judgment against defendants George F. Schorr and Carrie B. Schorr in the superior court of the state of Washington, in and for Spokane county, in a suit therein pending wherein this plaintiff was plaintiff and the said George F. Schorr and Carrie B. Schorr were defendants, for the principal sum of \$327.25, and the further sum of \$50 attorney's fees, and the costs of action taxed at \$13.55, which said judgment provided that the same should bear interest at the rate of one and one-quarter per cent. per month from its date, to-wit, November 23,

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1891, which said judgment was duly rendered by said court upon said date, and duly entered as provided by law.

"4. That a transcript of said judgment, as provided by law, was filed with the auditor of Spokane county, Washington, on the 14th day of December, 1891, and thereafter by him recorded in Volume "C," Records of Judgments of said county, on page 61 thereof.

"5. That said judgment has been ever since its rendition, and now is, a lien upon the real estate of the defendants George F. and Carrie B. Schorr, situate in Spokane county, Washington, described as follows, to-wit: [Here follows a description of the property as described in the complaint in this action, as having been conveyed to the appellant by George F. and Carrie B. Schorr.]

"6. That thereafter, and on the 21st day of April, 1892, said defendants George F. and Carrie B. Schorr made, executed, and delivered to defendant E. N. Brier their certain warranty deed of that date, wherein and whereby they conveyed to the said E. N. Brier the above described real estate, for the consideration expressed in said deed of \$2,250, and plaintiff alleges that as a matter of fact said deed is wholly without consideration and was made for the purpose of cheating and defrauding this plaintiff and other of the creditors of said George F. and Carrie B. Schorr, and plaintiff also alleges that said land at the time of said conveyance was, and yet is, subject to the lien of plaintiff's judgment as aforesaid.

"7. Plaintiff further alleges that the defendants George F. and Carrie B. Schorr have no other property out of which plaintiff can make said judgment, save and except the property described in this complaint and the following described real estate, to-wit: [Here follows a description of the property conveyed to Louise B. Stratton as described in the complaint in this action.] And that this last described real estate was upon the 29th day of April, 1892, conveyed by said George F. and Carrie B. Schorr to Louise Stratton with a like purpose of defrauding this plaintiff, and that this plaintiff has commenced suit to subject said property to the lien of plaintiff's judgment.

"8. That on the 13th day of April, 1893, plaintiff caused execution to issue upon its said judgment, but there is no property upon which it can levy the same, and out of which it can make the money on said judgment, save and except the two pieces of property described in this complaint.

"Wherefore plaintiff prays judgment against defendants that the said judgment may be declared a lien upon the real estate first above in this complaint described, and that the said deed from said George F. Schorr and Carrie B. Schorr to defendant E. N. Brier *may be set aside and held for naught as against the judgment of plaintiff*, and that a decree may be had against defendants authorizing and directing plaintiff and the sheriff of Spokane county to sell said real estate upon the execution issued on said judgment as aforesaid, and for such other and further relief as to the court may seem meet and proper, and that plaintiff may have a decree for the amount of said judgment and attorneys fees and costs and accumulated interest thereon, amounting to the sum of \$460.80 and interest thereon from this day; said decree directing the sheriff of Spokane county to sell said land to satisfy the amount of said judgment, or so much of said land as may be necessary therefor, and for costs of this suit."

Thereafter said defendants, and each of them, appeared in said suit and filed their answers therein. The admissions, denials, and prayer of each were as follows:

"Admit:

"1. Each and every allegation in paragraphs one and two of said complaint contained.

"2. The execution and delivery of the deed in paragraph six of said complaint alleged, at the time therein alleged."

"Deny:

"1. Each and every allegation in paragraph six of said complaint contained, not hereinbefore specifically admitted.

"2. Having any knowledge or information of the facts alleged in paragraphs three, four, five, seven, and eight

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of said complaint sufficient to form a belief thereof, wherefore defendants deny each and every allegation in said paragraphs contained.

"Wherefore defendants pray judgment against plaintiff for their costs and disbursements in their behalf in this action expended, and for such other and further relief as to the court may seem meet and just."

Said suit was thereafter duly brought on for trial upon the issues so framed, and upon said trial the court made its findings of fact and conclusions of law, as follows:

"This cause coming on to be tried upon the evidence, the court having listened to the testimony and the argument of counsel, *finds as proven the following*:

"1. That the plaintiff is a banking corporation organized and existing under and by virtue of the laws of the United States.

"2. That defendants George F. and Carrie B. Schorr are and have been, at all times mentioned in these findings, husband and wife.

"3. That upon the 23d day of November, 1891, plaintiff recovered judgment against defendants George F. and Carrie B. Schorr for the sum of \$327.25 principal, \$50 attorney's fees, costs of action \$13.55, and interest thereon at the rate of one and one-quarter per cent. per month from said 23d day of November, 1891, which said judgment has never been paid, and upon which there is now due and owing \$——, and interest thereon at the rate of one and one-quarter per cent. per month from this 13th day of October, 1893.

"4. That plaintiff filed its transcript of judgment with the auditor of Spokane county, state of Washington, upon the 14th day of December, 1891, as provided by law, and the same was recorded in book "C," Records of Judgments of said county, on page 61 thereof, as required by law; and that an execution was issued upon said judgment and returned *nulla bona*.

"5. That upon the 21st day of April, 1892, defendants George F. and Carrie B. Schorr conveyed the following described real estate to defendant Mrs. E. N. Brier by

warranty deed of that date, for the consideration expressed in said deed of \$2,250, to-wit: [Here follows description of property deeded to appellant by George F. and Carrie B. Schorr, as alleged in the complaint in this action].

"6. That plaintiff's judgment is a lien upon said real estate, and it is entitled to make the same therefrom by execution sale.

"As conclusions of law from the foregoing, the court finds that the plaintiff is entitled to have said real estate sold on execution on said judgment, free and clear of said conveyance, and that the said conveyance to Mrs. E. N. Brier, defendant, is subject to the said judgment of plaintiff."

Upon such findings and the evidence the court made its decree as follows:

"This cause coming on to be heard upon the testimony, the court having heard the evidence and listened to the argument of counsel, and being fully advised in the premises, and having made and filed his findings of fact and conclusions of law herein, it is therefore ordered, adjudged, and decreed by the court that plaintiff's judgment is now, and ever since its rendition has been, a lien upon the following described real estate, to-wit: [Here the decree follows the description of the property conveyed to the appellant as well as that conveyed to Louise Stratton.] That the conveyance made by the defendants George F. and Carrie B. Schorr of said real estate by their warranty deed of date the 21st day of April, 1892, to defendant Mrs. E. N. Brier, alleged in the complaint and referred to in the findings of fact herein, *was and is subject to the lien of the said judgment of plaintiff*; and it is further ordered, adjudged, and decreed that plaintiff may proceed to sell the said real estate on execution upon its judgment in manner and form as provided by the statutes of Washington and the laws of this state, and that the purchaser at such execution sale shall take all the rights, title, and interest therein, *owned, had, and possessed by the defendants George F. and Carrie B. Schorr at the*

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time of the rendition of said judgment, to-wit, on the 23d day of November, 1891, to the same extent and degree as it might and would have taken the same had said conveyance by George F. and Carrie B. Schorr not been made to the defendant Mrs. E. N. Brier; and it is further ordered, adjudged, and decreed that out of the moneys so arising from said sale the sheriff shall pay to the plaintiff the said judgment, costs, interest, and attorneys' fees taxed therein and accrued thereon, and in addition thereto the costs of this suit, taxed at \$30.25."

That the deed referred to in the pleadings, findings, and decree in said suit is the same deed set forth in the complaint herein, and the realty referred to and described in the pleadings, findings, and decree in said suit, is the same realty described in the complaint herein; that the decree rendered in said suit, and hereinbefore set forth, was not appealed from, and is now in full force and effect; that, relying upon the judgment and upon the decree hereinbefore set forth, this respondent caused said judgment to be revived by the said superior court upon March 17, 1897, and upon March 25, 1897, caused a writ of execution upon said judgment to issue from said superior court to the sheriff of said Spokane county; that thereafter the said sheriff duly levied upon the property described in the complaint herein, as the property of the judgment debtors Schorr, and thereafter, upon May 1, 1897, duly sold said property at execution sale to this respondent; that after the sale was so made to the respondent it applied to the superior court of Spokane county for an order confirming said sale, and said court, while finding the sale regular in all other respects, refused to confirm it for the reason that the realty sold was the homestead of said judgment debtors; that thereupon respondent appealed from said refusal and order of the court to the supreme court of the state of Washington, the action of the lower court was by said supreme court reversed (*Traders' National Bank v. Schorr*,

20 Wash. 1, 54 Pac. 543), the sale to the respondent was confirmed, and a deed for said property issued to it by the sheriff of said county.

The facts as found in the suit of the respondent brought in 1893 against George F. and Carrie B. Schorr and the appellant are undisputed. Is the decree rendered in that action *res judicata* as to the rights of the appellant in this action? The court below found as a conclusion of law that, by the decree entered in the suit brought in 1893 by the respondent against the Schorrs and the appellant, the conflicting rights, claims, and interests of the respondent and the appellant were adjudicated and forever placed at rest; that by the order of March 17, 1897, the lien of the judgment of the respondent was revived and continued against the real estate claimed by the appellant; that the appellant was bound by the order of revival; that the respondent was the owner in fee simple of the real estate claimed by appellant, free from any right, title, or interest claimed by the appellant; and that the respondent's title should be quieted against the appellant. The statute, in force when the original judgment of the respondent against the Schorrs was obtained and filed in the auditor's office of Spokane county, was to the effect that the real estate of any judgment debtor, and such as he might acquire, should be held and bound to satisfy any judgment recovered in this state *for the period of five years from the day on which the judgment was rendered*. The lien on a judgment of the superior court of the county in which the real estate of the judgment debtor was situated was from the date of the rendition of the judgment, if within twenty days of that time a certified transcript of the judgment was filed and recorded in the county auditor's office of the county where the judgment debtor's lands were situated; but, if the transcript was not filed in twenty days from the rendi-

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tion of the judgment, the lien of the judgment was suspended until the filing of the transcript. From and after the filing of the transcript by the county auditor, the judgment became a lien upon all real estate of the judgment debtor in the county *for the period of five years, commencing from the date on which the judgment was rendered.* 2 Hill's Code, § 460. The judgment creditor had the right to enforce the collection of his judgment out of any real estate of the judgment debtor *upon which the judgment was a lien.* 2 Hill's Code, § 467, subd. 1. If any judgment remained unsatisfied at the end of five years after the date of its rendition, the lien thereof might be revived and continued. To accomplish this, the judgment creditor was required to file a motion with the clerk of the court where the judgment was entered, "*to revive and continue the lien of the same, with leave to issue an execution.*" This motion was required to state the names of the parties to the judgment, the date of its entry, and the amount claimed to be due thereon, and it was required to be verified in the same manner as a complaint. At any time after this motion was filed the party filing it could cause notice to be served on the judgment debtor in like manner and with like effect as a summons, and this notice, with a copy of the motion, was to be served by the sheriff or other officer as an original summons. By it the judgment debtor was cited to appear and show cause why said motion should not be allowed. The judgment debtor has the same time to appear and show cause as he had to answer a complaint, and the law applicable to the service of summons applied to the service of the notice. The judgment debtor could answer or demur to the motion within the time allowed by law to answer the complaint, and could allege any defense to the motion which he might have. If no answer was filed within the time prescribed, the mo-

tion was to be allowed as of course. If an answer was filed, the moving party could demur or reply. The pleadings were required to be subscribed and verified, *and the proceedings concluded as in original actions*. The order made by the court was required to specify the amount due upon the unsatisfied judgment *for which execution was to issue*, and the motion was not to be granted unless there was proof that the judgment or some part thereof remained unsatisfied. The effect of the order of the court *was to operate as a revival of the judgment for the amount found due*, and that the same should “*be and continue a lien upon real estate of the judgment debtor for a period of five years from and after the date of such order*, in like manner with the original judgment.” A transcript of the same was to be filed within twenty days in the office of the county auditor of the county where the lands of the judgment debtor lay, or the lien was suspended until such transcript was filed. Revived judgments were to bear the same interest and be in all respects similar to original judgments as to lien and enforcement or collection. No judgment was to be revived or continued unless proceedings were commenced *within* six years after the date of its rendition. 2 Hill’s Code, §§ 462, 463. It would seem that at the end of five years from its rendition a judgment ceased to be effective for any purpose; no real estate of the judgment debtor was bound for its satisfaction, and no execution could be issued thereon. The owner of such dead or expired judgment might revive it. While the language in the first part of § 462, *supra*, is “the lien thereof may be revived and continued,” § 463, *supra*, declares that the order of the court “shall operate as a revival of the judgment for the amount found due at the time of such revival, and the same [that is, the revived judgment] shall be and continue a lien upon real estate of the judgment debtor for a period of five years *from and after the date of such order*, in

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like manner with the original judgment." It is not the mere lien that is revived; it is the judgment itself, and the lien as an incident of the revived judgment, if a certified copy is filed with the auditor, becomes operative in the same manner as if it was an original judgment. Sections 462, 463, *supra*, simply point out a mode by which an action on a judgment which has ceased to be effective for any purpose may be brought so as to obtain a new judgment. The very term "revive" means to restore or bring again to life. When revived it becomes a new judgment, on which execution may issue as a personal liability, and it continues in existence for five years longer, from the date of the order of revival, and the lien thereof, like the judgment, an incident thereto, is a new creation, and dates from the order of revival, if a transcript is filed in twenty days; otherwise, the lien is suspended just as if it was an original judgment. The contention of the respondent that the proceedings to revive must be instituted "at the end" of the five years, and not "within" the year following, cannot be sustained. While § 462, *supra*, reads, if any judgment remains unsatisfied "at the end of five years after the date of its rendition, the lien thereof may be revived," etc., § 463, *supra*, says that "no judgment shall be revived or continued unless proceedings for such revival or continuance shall be commenced *within six years* after the date of its rendition." The law does not provide that revival proceedings shall be commenced "at the end" of five years from the rendition of the judgment, but does provide that "within a year,"—that is, six years after the date of the rendition of the judgment,—revival proceedings must be instituted. A judgment creditor is supposed to avail himself, within the five years, of the right to issue an execution and exhaust thereunder the property of the judgment debtor upon which the judgment is a lien.

The law then gives the judgment creditor, after the first five years, the further right to have a new judgment for any unpaid balance, which, from the date of its rendition, will also become a lien for an additional five years, provided proceedings to revive such judgment are instituted within the one year, as we have stated. The proceedings to revive a judgment are analogous to complaint, answer, and reply in an ordinary action at law. The same formalities that are necessary for bringing a suit prevail. It is in all respects as much a new suit as if it was a common-law action on the judgment. The original judgment was rendered November 23, 1891. Five years from November 23, 1891, would be November 23, 1896, and on the next day, November 24, 1896, a motion to revive the judgment was filed under §§ 462 and 463, *supra*, but the order reviving it was not entered until March 17, 1897. Was the lien of the original judgment lost to the respondent, so that there was no lien against the real estate of the judgment debtor from November 24, 1896, until March 17, 1897? We think it was.

"A judgment-lien, binding the present and future real property of the debtor, is a creation of statute laws and has no other existence; a general lien by judgment does not constitute *per se* a property in the land itself, but only gives a right to levy on the same to the exclusion of adverse interests subsequent to the judgment. Hence a judgment creditor has neither *jus in re* nor *jus ad rem* in the debtor's land, but only the right to make his lien effectual by a sale under execution." 1 Black, Judgments, § 400.

"A judgment is not a specific lien upon any particular real estate of the judgment debtor, but a general lien upon all his real estate, subject to all prior liens, either legal or equitable, irrespective of any knowledge of the judgment creditor as to the existence of such liens." *Rodgers v. Bonner*, 45 N. Y. 379.

" . . . the lien of a judgment upon the lands of the judgment debtor is entirely the creature of the statute,

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and is not dependent in any manner upon the contract of the parties. It begins, continues and terminates at the will of the legislature." *Houston v. Houston*, 67 Ind. 276; *Buchan v. Sumner*, 47 Am. Dec. 305 (2 Barb. Ch. 165).

Section 460, 2 Hill's Code, provides that the real estate of a judgment debtor shall only be held and bound to satisfy any judgment for the period of five years from the date on which such judgment was rendered; and it also provides that the *lien* of the judgment on such real estate shall only be for five years, commencing from the date on which the judgment was rendered. Section 463 provides that a revived judgment shall be and continue a lien upon real estate of a judgment debtor for a period of five years *after the date of the order of revival*. It seems to us that the legislature has made it so plain there is no room for construction that the right to enforce the original judgment and lien incident thereto was at an end five years from the rendition of the judgment, and that the revived judgment and lien incident thereto could only be enforced for five years *from* the time of the rendition of the revived judgment. It is not within the province of a court to extend the lien to a case not provided by statute. Judge LANE, in delivering the opinion of the supreme court of Ohio, in the case of *Douglass v. Huston*, 6 Ohio, 156, 162, says:

"The existence, validity and extent of a judgment lien, are matters purely legal, dependent upon statutory provisions. If it fail at law, it cannot be aided in equity."

If the lien of a judgment is lost, and it is afterwards revived, a mortgage executed by the judgment debtors during the continuance of the original lien takes precedence over the revived judgment. *Tracy v. Tracy*, 5 McLean, 456 (24 Fed. Cas. p.114).

Under the statute of California the lien of a judgment

was two years from its date. A judgment was obtained on the 11th of October, 1853, upon which execution was issued and levied upon the 4th of October, 1855, and the property sold thereunder on the 20th of October, 1855. The question was whether the issue and levy of the execution before the lien of the judgment expired had the effect to prolong the lien beyond the two years. The supreme court of California says:

“The rule that confines the lien of the judgment strictly within the two years, is the most simple and certain in theory, and the most beneficial in practice. If we hold that the lien of the judgment may be prolonged beyond the period stated, by the issue and levy of an execution within the time, then we can fix no definite and certain limits to the continuance of the lien. Once we pass the limits of the statute, we open a door to the most vexatious litigation. The titles to real estate would become uncertain, and the useful end intended to be accomplished by our recording system would, in fact, be defeated. A party wishing to purchase the land of the judgment debtor could not do so with safety without the exercise of extraordinary diligence. The provisions of the code give the judgment creditor ample protection. He can cause an execution to issue at any time; and, under it, the sheriff can advertise and sell within the short period of twenty days. There is, therefore, no reason for allowing him the privilege of delaying the issue of execution until it is too late to sell before the lien expires. It is true that an occasional hard case may arise under the strict rule, but upon the whole, it must be productive of the most good.” *Isaac v. Swift*, 10 Cal. 71 (70 Am. Dec. 698); *Bagley v. Ward*, 37 Cal. 121 (99 Am. Dec. 256 and note); *Roe v. Swart*, 5 Cow. 294; *Little v. Harvey*, 9 Wend. 157; *Lawson v. Jordan*, 19 Ark. 297 (70 Am. Dec. 596); *McCormick v. Alexander*, 2 Ohio, 66.

In *Lawson v. Jordan*, *supra*, where the lien of the judgment had expired, it was also held that a junior judgment with a lien would have priority over one with-

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out, but of older date. In Iowa it was held that a judgment lienor, whose judgment had terminated by limitation before the rendition of a judgment in favor of a second judgment creditor against the same debtor, and who had at the time of recovery of the second judgment taken no steps to preserve or revive his lien, could not revive the same to the prejudice of such subsequent judgment. See, also, *Boyle v. Maroney*, 73 Iowa, 70 (35 N. W. 145); *Virden v. Shepard*, 72 Iowa, 546 (34 N. W. 325).

We now come to the consideration of cases which are identical with the case at bar in principle, and nearly so in fact. In the case of *Flagg v. Flagg*, 39 Neb. 229 (58 N. W. 109), the facts show certain judgments were recovered against a debtor, who thereafter executed a mortgage upon premises owned by him, which were subject to the lien of the judgments. At the time of commencement of an action for the foreclosure of a first mortgage in favor of a plaintiff who had purchased the outstanding judgments against the debtor, the same were a valid and subsisting lien upon the real estate in controversy, superior to the lien of the second mortgage. During the pendency of the action, the lien of the judgments, as provided by the statute of Nebraska, expired. The second mortgagee, by leave of court, filed an amended answer in the suit to foreclose the first mortgage, setting up the dormancy of the judgment pending the prosecution of the action. It is provided by the Code of Nebraska that:

"If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered in any court of record in this state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out the writ of execution, such judgment shall

become dormant and cease to operate as a lien on the estate of the judgment debtor."

The court says:

"In construing a statute where the meaning is not clear, the rule is to give it such interpretation as will comport with what is supposed to have been the purpose or intention of the legislature; in other words, where the intention is manifest, it will control, rather than the language employed by the lawgivers. In the section quoted, however, there is no ambiguity; no words employed which operate to defeat the clear and manifest intention of the enacting power. In fact, there is no room for construction. We must, therefore, apply the section according to its literal meaning. It is obvious that in case a judgment creditor fails for more than five years after the date of his judgment to sue out an execution, the judgment becomes dormant, and ceases to be a lien upon the real estate of the defendant. We see no escaping the conclusion that, where a judgment becomes dormant, its lien is thereby lost as against a mortgage made by the debtor during the life of the judgment."

In the case of *Tucker v. Shade*, 25 Ohio St. 355, it is said:

"Judgment liens are created by the statute, and their extent and duration are such as the statute prescribes."

The Code of Ohio provides that:

"The lands and tenements of the debtor within the county where the judgment is entered, shall be bound for the satisfaction thereof, from the first day of the term at which the judgment is rendered. . . . All other lands . . . shall be bound from the time they shall be seized on execution."

A further provision is made that:

"If execution shall not be sued out within five years from the date of any judgment, . . . or if five years shall have intervened between the date of the last execution issued on such judgment and the time of the suing

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out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor."

The court said:

"It is well settled that the title of a purchaser from the judgment debtor is, on the judgment becoming dormant, discharged from the lien, and that the subsequent revivor of the judgment will not affect such title."

In the case of *Norton v. Beaver*, 5 Ohio, 178, it was held that the rights of others, acquired or subsisting under the dormancy of the judgment, are subordinate to the revived lien. That court says:

"In a country where land is one of the most familiar and ordinary subjects of trade, the policy of the law does not favor liens which impose embarrassments on their transfer. The purchaser who acquires title to land at the time when no lien exists, or at a time when, by the creditor's delay, a once existing lien becomes dormant, appears to us to have an equity preferable to him who has indulged in delay. . . . The lien of the creditor, at this time, is indefinite and contingent. It is not a subsisting interest in the lands, but a power to set up an interest that may never be exercised. He may prefer to enforce payment of his debt against other property, or against the person of the debtor. The purchaser has no means in his hands to guard against future dormant claims. It is, therefore, better that such sleeping creditors should sometimes lose their money, than that titles acquired in good faith, while they slumbered, should be rendered precarious."

In the case of *Miner v. Wallace*, 10 Ohio, 404, it was held that a mortgage executed by a judgment debtor after recovery of the judgment takes priority over the judgment after its dormancy and revival. As was well said by the court in the case of *Graff v. Kipp*, 1 Edw. Ch. 619:

"A plaintiff must take care to sell the lands of the

defendant before the expiration of the ten years, in order to avoid the danger of other incumbrances intervening; or if he wishes to continue a lien without a sale, then he must have a fresh judgment docketed before other creditors come in and obtain judgments." *Coombs v. Jordan*, 3 Bland Ch. 284 (22 Am. Dec. 236); *McCormick v. Wheeler*, 36 Ill. 114 (85 Am. Dec. 388).

We conclude that, when a judgment ceases to be effective, the lien likewise ceases, and it cannot be revived so as to affect the rights of intervening purchasers; and that from November 24, 1896, until March 17, 1897, the judgment of respondent ceased to be effective for any purpose, and the lien thereof also ceased, and was not binding upon the property in controversy; that the sale on execution on the revived judgment passed only the interest of the judgment debtors subject to the intervening interest of the appellant which attached to the property under her deed, unless the decree entered in the suit brought by the respondent in 1893 against the appellant and the Schorrs estopped the appellant from setting up that interest.

"The question of the conclusiveness of records most frequently arises on judgments. The doctrine is well established that a cause of action once finally determined, without appeal or some proceeding for the annulment of the judgment between the parties on the merits by any competent tribunal, cannot afterwards be litigated by a new proceeding either before the same or any other tribunal. But there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a *second action* upon the same claim or demand and its effect as an estoppel in *another action* between the same parties upon a *different claim or cause of action*. In the former case, the judgment as rendered upon the merits constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them not only

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as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But where the *second action* between the same parties is *upon a different claim or demand*, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted *upon the determination of which the finding or verdict was rendered*. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in suit upon a different cause of action, the inquiry must always be *as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined*. Only upon such matters is a judgment conclusive in another action." 11 Am. & Eng. Enc. Law (2d ed.), p. 390.

What was the claim upon which the action was waged between the respondent and the appellant and the Schorrs in 1893? It was that a judgment recovered against the Schorrs on November 23, 1891, and which had been filed in the office of the auditor of Spokane county, December 14, 1891, should be declared a superior lien upon the property conveyed to the appellant by the Schorrs by the deed filed for record June 20, 1892; that plaintiff in that action, respondent in this, under the execution issued on the judgment of November 23, 1891, might have the right to sell the property described in said deed to satisfy the judgment upon which the execution issued, and that Mrs. Brier's deed might be "set aside and held for naught *as against the judgment of the plaintiff*." What is the claim in this action? Stating it negatively, it is that a judgment recovered by the respondent against the Schorrs on March 17, 1897, on which an execution was issued on March 25, 1897, and under which the property in

controversy was sold, is not superior to the rights of the appellant in her deed from the Schorrs filed for record June 20, 1892. The allegation in the complaint of 1893, that "the deed was wholly without consideration and was made for the purpose of cheating and defrauding the plaintiff," was immaterial, because it made no difference, so far as the plaintiff's rights in that suit were concerned; for if it (the bank) obtained a judgment and filed it, as is alleged, the law gave it a lien superior to the claim under the deed of 1892.

"Issues which are not material to the controversy, although determined; do not become *res judicata*." *McGee v. Wineholt*, 23 Wash. 748 (63 Pac. 571).

It was not only unnecessary to litigate that question, but there was no inquiry as to the question of fraud in that action. The respondent should be bound by its pleadings and proof in this action. It pleaded that the court made certain findings of fact in the suit brought in 1893. It set forth those facts. They were not denied, and it introduced the record to prove them. The recital in the findings is:

"This cause coming on to be tried upon the evidence, the court, having listened to the testimony and the argument of counsel, *finds as proven* the following."

It finds all the facts as claimed by plaintiff in its complaint, except on the allegation "that the deed was wholly without consideration, and was made for the purpose of cheating and defrauding the plaintiff," and on this point the finding is "that upon the 21st day of April, 1892, defendants George F. and Carrie B. Schorr conveyed the following described real estate [the description is the same real estate as in controversy in this action] to the defendant Mrs. E. N. Brier, by warranty deed of that date, for the consideration expressed in said deed of \$2,250."

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The court then made its legal conclusions in this language:

"As conclusions of law *from the foregoing* the court finds that the plaintiff is entitled to have said real estate sold on execution on said judgment free and clear of said conveyance, *and that the said conveyance is subject to the said judgment of plaintiff.*"

The decree of the court recites that he has "made and filed his findings of fact and conclusions of law herein, it is therefore ordered, adjudged," etc. Why is it adjudged? Because certain facts have been found to exist. What is adjudged? That the judgment of the plaintiff ever since its rendition has been a lien on the property; that the conveyance made by the defendants to Mrs. E. N. Brier, by their deed of the 21st of April, 1892, *was and is subject to the lien of the judgment of the plaintiff*; and that the plaintiff may sell the property on execution upon its judgment, and that the purchaser at such sale shall take all the right, title, and interest therein owned and possessed by the defendants Schorr *at the time of the rendition of the judgment, to-wit, November 23, 1891*, to the same extent and degree as it might or would have taken the same had said conveyance not been made to Mrs. Brier. There is nothing in this decree that sets aside the deed as being fraudulent or void, but it simply declares, what the law declared, without the decree, that the purchaser at the execution sale took the interest in the property that the judgment debtors had at the date the judgment was rendered. It would be doing violence to the findings and the decree if we should construe it as the respondent contends for. There is nothing in the decree indicating that Mrs. Brier was cut off from her right to redeem from a sale on the execution, and, after the court had expressly found that the Schorrs had conveyed the property to her for \$2,250, it is not to be presumed

that the court intended to cut off her right to redeem from the sale; for, quoting from respondent's brief:

"It is presumed that the doings of a court of record are regular and proper, that its jurisdiction was properly acquired, that its proceedings are legal and valid, and that its decisions are well founded and free from error."

To construe this decree as respondent asks us to do would violate the presumption that the decisions of courts are free from error; for as the court found the conveyance to Mrs. Brier to be a fact, and to be for \$2,250, it could not, under the law, decree that Mrs. Brier should not have the right to redeem. In addition to the record the appellant introduced uncontradicted proof, which we think she had a right to do, that no evidence whatever on the question of fraud was introduced in the suit brought in 1893. This testimony in no way contradicts the record, but is consistent with it.

In the case of *Packet Co. v. Sickles*, 5 Wall. 580, Mr. Justice NELSON uses the following language:

"As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding that particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment

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necessarily involved its consideration and determination, it will not be concluded." *Turley v. Turley*, 85 Tenn. 251 (1 S. W. 891); *Burnham v. Webster*, 1 Woodb. & M. 172 (4 Fed. Cas. No. 2179); *Sawyer v. Woodbury*, 7 Gray, 499 (66 Am. Dec. 518); *Russell v. Place*, 94 U. S. 606.

We conclude that the matters arising in this suit were not litigated and determined in the action brought by the respondent, in 1893, against the Schorrs and the appellant and pleaded in this action as a defense. We think the evidence shows that the deed from the Schorrs to appellant was intended as a mortgage, but in that event Mrs. Brier held title in fee, "subject to the judgment," and, after the lien of the judgment of the bank expired, was the owner absolutely relieved of its lien. But the question as to whether the instrument is a deed or a mortgage was immaterial, under the issues in the suit brought in 1893, and one which did not concern the plaintiff. If a mortgage, it was subject to the lien of the bank's judgment; and if a deed, it occupied the same position. There was no occasion in that suit for determining the character of the instrument under which Mrs. Brier claims. The appellant was not a party to the proceedings to revive the judgment, she was not a necessary party to the same, and she was not required to take notice thereof. *Anderson v. Bigelow*, 16 Wash. 198 (47 Pac. 426); *Cul-lity v. Dorffel*, 18 Wash. 122 (50 Pac. 932).

We conclude from the evidence in this case that the court should have found the facts to be as requested by the appellant, and should have entered its decree adjudging and decreeing that the instrument of date April 21, 1892, made, executed, and delivered by George F. Schorr and Carrie B. Schorr to the appellant, recorded in Book 45, at page 223, of the Records of Deeds on file in the office of the auditor of Spokane county, was intended as secur-

ity for the payment to appellant of the sum of \$2,250, then owing to appellant from the defendants George F. and Carrie B. Schorr, and was in truth and in fact intended as a mortgage to secure said sum; that appellant is entitled to have said mortgage foreclosed, and a decree entered for the sale thereof by the sheriff of Spokane county of said premises covered thereby, and that, after the said sheriff shall have paid to himself his regular fees and commission for and upon said sale, he shall pay to appellant the sum of \$2,250, with interest thereon from April 21, 1892, at the legal rate, and the costs and disbursements of this suit; that whatever interest in said premises the defendants Jacob Schorr, Charles F. Schorr, Louise B. Stratton, Palmer & Rey (a corporation), Northwestern & Pacific Hypotheekbank (a corporation), Northwestern Wadham, J. M. Comstock, City of Spokane (a municipal corporation), J. H. Bishop & Co. (a corporation), H. L. Tatum and J. J. Bowen (copartners as Tatum & Bowen), and Henry M. Tilford, each has, or claims to have, in or to said premises described in said instrument, or any part thereof, each and all of said claims and interests are subject, subsequent, and inferior to the lien of said appellant, by virtue of said instrument, in form a warranty deed, but intended as a mortgage, from the time of the filing thereof for record; that upon failure of respondent Traders' National Bank to issue execution and sell the premises referred to thereunder within five years from and after the rendition of its said judgment, to-wit, November 23, 1891, the lien of said judgment was lost, and on the revival of said judgment the lien of said revived judgment became, and has ever since remained, and now is, subject, subsequent, and inferior to the rights of said appellant, by virtue of said instrument, in form a warranty deed, but intended as security, heretofore referred

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to; that the effect of the decree entered October 13, 1893, in the aforesaid action, was to adjudicate that at the time of the entry of said decree, said judgment of the Traders' National Bank was then a superior and paramount lien upon the property described in said decree, and the same was not intended to, and did not, determine the invalidity of said deed from George F. Schorr and Carrie B. Schorr to the appellant of date April 21, 1892; nor was said decree intended to determine, as between appellant and defendants George F. and Carrie B. Schorr, that said instrument was in fact a mortgage; that appellant is entitled to recover from respondent her costs and disbursements in this behalf made and expended.

The judgment and decree entered in the court below is reversed and set aside, and this cause is remanded, with instructions to enter a decree to conform to this opinion; the appellant to recover her costs on this appeal.

REAVIS, C. J., and FULLERTON and ANDERS, JJ., concur.

[No. 3603. Decided March 19, 1901.]

In the matter of the contempt of W. A. LEWIS.

Appeal from Superior Court, Spokane County.—Hon. WILLIAM McDONALD, Judge. Reversed.

Graves & Graves and Sullivan, Nuzum & Nuzum, for appellant.
Patrick H. Winston and Alex. M. Winston, for respondent.

PER CURIAM.—The appellant was adjudged guilty of contempt of court, and sentenced to serve a term of ninety days in the county jail. From the recitals of fact in the judgment it appears that a certain cause had theretofore been tried before the court and a jury, in which the appellant had appeared as attorney, and in which the jury had returned a verdict against his client; that the appellant had filed a motion for a new trial, and in support thereof had procured and filed, among others, the affidavit of the acting court stenographer which contained recitals tending to sup-

port a statutory ground for the granting of the motion. This affidavit, the judgment recites, was composed by the appellant "willfully and knowingly, and for the purpose of impugning the motives of the court and of bringing the court into contempt and disrespect," and "for the purpose of vilifying and scandalizing the judge of said court;" the appellant "well knowing that said matters and things complained of were false, and that he had secured the affidavit of the said" stenographer "by fraudulent and corrupt practices" We shall not review the record upon which the judgment is based, meager though it is. Suffice it to say that it contains nothing to justify either the facts found, or the sentence imposed. The judgment will therefore be reversed, and the cause remanded with instructions to dismiss the proceedings.

[No. 3602—Decided April 5, 1901.]

SPOKANE FALLS GAS LIGHT COMPANY, *Appellant*, v. SPOKANE STREET RAILWAY COMPANY, *Respondent*.

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge. Reversed.

W. J. Thayer, for plaintiff.

Stephens & Bunn, for defendant.

PER CURIAM.—This is an action for injunctive relief. From the judgment of the trial court both parties appeal. It is insisted by the plaintiff that the evidence, and the findings of the court thereon, warranted further relief than the judgment awarded, and by the defendant it is insisted that the judgment rendered is based upon findings of fact which the evidence is insufficient to support. After a careful and painstaking examination of the entire record we are forced to the conclusion that the defendant's contention is correct. We are unable to find sufficient evidence to support the findings and decree, or sufficient evidence upon which any relief can be granted the plaintiff. As this conclusion involves no principle of law, it would serve no useful purpose to enter upon a discussion of the case. The judgment appealed from is therefore reversed, and the cause remanded, with instructions to enter a judgment of dismissal and for costs in favor of the defendant.

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PETER ANDERSON *et al.*, Respondents, v. J. B. CLOCK *et al.*, Defendants, J. BLUMAUER & SONS, Appellants.

Appeal from Superior Court, Thurston County.—HON. OLIVER V. LINN, Judge. Affirmed.

Troy & Falknor, for appellants.

John R. Mitchell, Phil. Skillman and *J. W. Robinson*, for respondents.

PER CURIAM.—For the reasons assigned in *Blumauer v. Clock*, just decided, *ante*, p. 596, the judgment is affirmed.

[No. 3858. Decided April 15, 1901.]

THE STATE OF WASHINGTON on the relation of *R. B. McLeod* v. SUPERIOR COURT OF KING COUNTY.

Original Application for Prohibition.

George G. Williamson and *Root, Palmer & Brown*, for relator.

E. H. Guie and *Vince H. Faben*, for respondent.

PER CURIAM.—For the reasons stated in *State ex rel. Wallace v. Superior Court of King County*, just decided, *ante*, p. 605, the writ in this case is denied.

[No. 3516. Decided April 16, 1901.]

GRAY'S HARBOR COMPANY, Appellant, v. THOMAS McNALLY *et ux.*, Respondent.

Appeal from Superior Court, Chehalis County.—HON. CHARLES W. HODGSON, Judge. Reversed.

Sidney Moor Heath and *Stephens & Bunn*, for appellant.

W. H. Abel, for respondents.

PER CURIAM.—The essential facts and questions of law presented by the record in this case are the same as those before this court in *Gray's Harbor Co. v. Drumm*, 23 Wash. 706. On the authority of that case the judgment is reversed and the cause remanded, with instructions to enter a judgment in favor of the appellant.

[No. 3656. Decided April 16, 1901.]

MARY LAMBERT *et al.*, Appellants, v. CARRIE N. GILLETTE *et al.*,
Respondents.

Appeal from Superior Court, Spokane County.—Hon. LEANDER
H. PRATHER, Judge. Affirmed.

Lewis & Lewis, for appellants.

James Dawson and S. C. Hyde, for respondents.

PER CURIAM.—In 1893, Mary Lambert, one of the plaintiffs, employed the firm of Fenton, Henley & Fenton, attorneys, to collect an account against defendant Gillette. They commenced suit, and procured judgment on the account, had execution issued thereupon, and made various attempts to levy upon property. The only property discovered liable for the judgment was a city lot in Spokane, which was incumbered by a mortgage apparently of much greater value than the lot, and no further attempt to collect the judgment seems to have been made by the attorneys, when, in the year 1896, the judgment lien on the lot was satisfied by one of the attorneys mentioned. Thereafter, for a consideration much less than the mortgage, the lot was conveyed by defendant Gillette to defendant Kelley, the mortgagee receiving a small sum in satisfaction of the mortgage. Thereafter plaintiff Lambert, by her present counsel, procured an execution upon her judgment against Gillette, levied upon and sold the lot in question, and secured a sheriff's deed therefor, and conveyed to the plaintiff Lewis a one-half interest in the lot. This suit was then instituted to quiet the title. The court found that the act of the attorney in releasing the lien of the judgment was ratified by the plaintiff Lambert; that defendant Kelley and wife had entered into possession and for some years occupied the lot and erected valuable improvements thereon, and that plaintiff had made no objections during the progress of such improvements; and quieted the title in the defendants Kelley and wife.

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- by the clerk until July 24th—there being but one judgment in the case.—*Id.*..... 119
9. *Same—Sufficiency of Bond—Description of Oblige.* An undertaking given on appeal, intended both as an appeal bond and a supersedeas bond, which undertakes "that the appellant will satisfy and perform the judgment appealed from," is sufficient, without mentioning the name of the obligee with particularity.—*Id.*..... 119
10. *New Trial—Abuse of Discretion.* The action of the trial court in granting a new trial cannot be considered as an abuse of discretion, when there was a substantial conflict in the testimony, and there was nothing in the record disclosing that the new trial was granted because of a misconception of the law applicable to the case.—*Lattimer v. Black*..... 231
11. *Harmless Error—Pleading Statute of Limitations—Sufficiency of Answer.* An answer, in an action for conversion of plaintiff's goods, which alleges that "For further and affirmative answer to said complaint, defendant says that more than three years elapsed between the accruing and commencement of plaintiff's alleged cause of action," while defective as a plea of the statute of limitations, is yet sufficient to put the plaintiff on notice that the statute would be relied on as a defense, and, where not moved against in the lower court by demurrer or motion, will on appeal be considered as amended, under Bal. Code, §§ 4957, 6535, since no substantial right of the plaintiff was affected by its defectiveness.—*Kinthead v. Holmes & Bull Furniture Co.*..... 216
12. *Appealable Order—Denial of Motion for Judgment in Garnishment Proceedings.* The action of the court in denying plaintiff's motion for judgment against garnishee defendants, based upon their answer in the garnishment proceedings, is not such a final determination of the proceeding as to constitute an appealable order, within the contemplation of title 36, Ballinger's Code.—*Green v. Moore* 241
13. *Review in Equity Cases—Decision Based on Wrong Grounds.* Although the judgment of the lower court in an equity case may have been based upon a proposi-

APPEAL—CONTINUED.

- tion of law which cannot be sustained, yet, where all the testimony is before the appellate court for inspection, the judgment will not be reversed, if it can be sustained upon any legal principle.—*Sanders v. Bartelt*..... 244
14. *Harmless Error—Refusal to Strike Exhibits from Complaint.* The refusal of the court to strike from a complaint an exhibit containing a statement of items of damage demanded from defendant, which named a sum in excess of the amount demanded in the complaint, was not prejudicial, when the court fully advised the jury of the limit of damages claimed and what was before them for investigation.—*Tyler v. North American T. & T. Co.*..... 252
15. *Sufficiency of Evidence.* The verdict of the jury will not be disturbed upon a disputed question of fact, where the evidence is conflicting.—*Uren v. Golden Tunnel Mining Co.*..... 261
16. *Errors Not Urged Below—Admission of Evidence.* Where evidence as to the incompetency of a mine superintendent was admitted without objection, in an action against the company for injuries resulting from his negligence, and the defendant tried its cause on that issue, it cannot urge on appeal that the court erred in submitting the question to the jury.—*Id.*..... 261
17. *Harmless Error—Admission of Evidence.* Error in permitting the husband to testify that the value of the loss of his wife's services by reason of her sickness occasioned through the act of defendant was \$2,000, instead of requiring the witness to state the facts and circumstances of the injury, for the purpose of allowing the jury to determine the amount, was harmless, where the verdict rendered was for \$600.—*Sievers v. Dalles, P. & A. Navigation Co.*..... 302
18. *Non-Suit—Sufficiency of Evidence.* Refusal to grant a non-suit is not error, when there is evidence, though conflicting, sufficient under the allegations of the complaint to sustain the verdict.—*Id.*..... 302
19. *Non-Suit—New Trial—Sufficiency of Evidence.* Refusal of the court to grant a non-suit before verdict or a new trial after verdict is not error, when there was sufficient

APPEAL—CONTINUED.

- evidence to justify the trial court in submitting the case to the jury, and when there was evidence, though conflicting, sufficient to support the verdict rendered.—*Wulf v. Sullivan*..... 306
20. *Harmless Error—Sustaining Demurrer to Pleading.* Error of the court, if any, in sustaining a demurrer to a reply, is cured by the subsequent admission of testimony in support of the allegations contained in the reply.—*Washington National Building, Loan & Investment Ass'n v. Saunders*..... 321
21. *Law of Case—Questions Raised on Appeal.* In an action to establish a claim which had been rejected by an administratrix, where, upon an appeal by plaintiff, the defendant had made the point, and fully argued it, that a grant of a new trial would be a useless thing for the reason that the claim had not been fully verified, it will be presumed on a second trial, from the fact that the supreme court granted a new trial, that the supreme court had under consideration the question of verification, although not passing directly thereon, and that the sufficiency of the verification was established as the law of the case.—*Taylor v. Gale* 336
22. *Appealable Order—Refusal to Cancel Lis Pendens.* A *lis pendens* notice can properly be filed only when there is an action pending involving the land covered by the notice, and the filing of such notice by one of the parties to an action after it has been determined against him constitutes a cloud upon his adversary's title, which he has a right to have removed; hence an order of the court refusing to act upon his motion for its cancellation is an order affecting a substantial right and therefore appealable.—*Washington Dredging & Imp. Co. v. Kinneer* 405
23. *Findings Objectionable in Form—Waiver of Error.* Failure to except in the trial court to the form of the findings or conclusions of the court constitutes a waiver of error therein.—*Bignold v. Carr* 413
24. *Record—Identification Without Judge's Certificate.* An agreed statement of facts upon which a cause had been tried will not be stricken on appeal for want of the trial judge's certificate, when it is sufficiently identified

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- by the court's findings and by the accompanying record.
—Townsend Gas & Electric Light Co. v. Hill 469
25. *Harmless Error—Erroneous Findings.* An erroneous finding of fact by a court, which does not materially affect the merits of the controversy, does not constitute prejudicial error.—*Id.*..... 469
26. *Appeal Bond—When Not Required of Public Officers.* Public officers need not furnish an appeal bond, when they appeal in behalf of public corporations which by law are exempted from the necessity of furnishing such a bond.—*Id.*..... 469
27. *Harmless Error—Refusal to Allow Nominal Damages.* Although error may have been committed in giving defendant judgment on the pleadings, in an action for damages for breach of a bond, when the pleadings show plaintiff entitled to nominal damages, yet the cause should not be reversed merely that nominal damages may be assessed, as no substantial right is affected by the error.—*Johnson v. Cook* 474
28. *Striking Allegations of Answer—Cured by Admission of Evidence.* Error of the court in striking a portion of the answer of defendants is not prejudicial when testimony in support of the stricken matter is subsequently admitted.—*Boardman v. Hager* 487
29. *Sufficiency of Evidence.* Where there is a substantial conflict in the testimony, the findings of the trial court will not be disturbed on appeal.—*Id.*..... 487
30. *Discretion of Court—Review on Appeal.* Where the appellate court is not in possession of all the circumstances surrounding the case upon which the lower court acted in refusing to vacate a judgment, there is no ground for its interference with the action of the lower court, since the question of the vacation of a judgment is so largely a matter of discretion, that the orders of the lower court therein will not be reversed, unless it plainly appears that the discretion has been abused.—*McCord v. McCord* 529
31. *Presumptions in Aid of Judgment.* It will be presumed in aid of a judgment, where the instructions are not before the appellate court for review, that errors of the

APPEAL—CONTINUED.

- trial court in the admission of testimony were corrected by withdrawing the objectionable testimony from the jury, since the presumption naturally attaches, where the record shows that the trial court acted affirmatively in the commission of error, that it maintained the same view of the law to the end of the case.—*Spo-
kane & Vancouver G. & C. Co. v. Colfelt*..... 568
32. *Dismissal—Resumption of Jurisdiction by Trial Court.* Where a motion by appellants to dismiss their own appeal was filed on June 26th, with respondent's permission to have the motion acted on at once indorsed thereon, and notice was served on the parties that the motion was granted, though a formal dismissal of the appeal was not made by the supreme court until September 14th, the trial court again acquired jurisdiction of the cause so as to make its orders entered therein on the 30th of June legal.—*De Mers v. Sandy Spit Fish Co.*..... 582
33. *Findings of the Trial Court—Conclusiveness.* In cases tried by the lower court without a jury, where exceptions to the findings and conclusions have been duly taken and the facts have been brought to the supreme court by a certified bill of exceptions or statement of facts, it is the province of the supreme court to examine the facts *de novo* and determine the case by the record, under Bal. Code, § 6520, and hence, in cases of conflicting testimony, the findings of the trial court are not as conclusive as the verdict of a jury, although there may be substantial testimony supporting them.—*Furth v. Baxter* 608
34. *Notice—Service by Mail.* Service of a notice of appeal by mail is sufficient, under Bal. Code, §§ 4890, 4891, 6504, when the person making the service and the person upon whom service is made reside in different places between which there is regular communication by mail.—*De Roberts v. Stiles* 611
35. *Appeal Bond—Authority of Attorney to Sign.* An attorney has authority to sign his client's name to an appeal bond.—*Id.*..... 611
36. *Same—Sufficiency—Guaranty Company as Surety—Signature by Attorney in Fact.* An appeal bond upon

APPEAL—CONTINUED.

- which the surety is a guaranty company whose name is signed by its attorney in fact is not defective in form because evidence of his authority to so sign was not filed with the bond.—*Id.*..... 611
37. *Same—Justification by Guaranty Company.* Where the surety upon an appeal bond is a guaranty company, no justification by the surety is required, under the terms of Bal. Code, § 1534.—*Id.*..... 611
38. *Same—Service of Appeal Bond or Written Notice on Respondent.* Service on respondent of the appeal bond or written notice of its filing is not mandatory under Bal. Code, § 6510, which provides that “any respondent may except to the sufficiency of the surety or sureties in an appeal bond, within ten days after the service on him of the notice of appeal or within five days after the service on him of the bond or written notice of the filing thereof.”—*Id.*..... 611
39. *Remedy by Appeal—Wrongful Issuance of Temporary Injunction—Dissolution of Final Hearing.* The action of the court in granting and continuing a temporary injunction pending the final disposition of an action cannot be reviewed on appeal, where the temporary injunction was dissolved on final hearing, but the remedy of defendant, if injured by its wrongful issuance, is by suit upon the injunction bond.—*Watkins v. Dorris.*..... 636
40. *Sufficiency of Evidence.* Where there is substantial evidence upon which to base a verdict, the verdict will not be disturbed on appeal on the ground of the insufficiency of the evidence.—*Packer v. Third St. & Suburban Ry. Co.*..... 646
41. *Sufficiency of Evidence.* Where the evidence is contradictory, but there is substantial testimony supporting the verdict of the jury, the verdict will not be disturbed on appeal, even though the court may believe that the weight of the testimony is against it.—*Miller v. Dumon* 648
42. *Discretion of Court—New Trial—Refusal When Judge Doubts Verdict.* A mere doubt as to the correctness of a verdict, expressed by the judge at the hearing of a motion for a new trial, is not ground for reversal by

APPEAL—CONTINUED.

- an appellate court of his action in refusing to grant the new trial.—*Id.*..... 648
43. *Requested Findings—Inconsistency.* The rule which declares it error for the court to make inconsistent findings has no application where a party to an action presents a request to the court in the alternative for two sets of findings, which are inconsistent in some particulars, for it is not objectionable to present findings covering different phases of the case which the testimony may support.—*Sackman v. Thomas.*..... 660
44. *Notice of Appeal—Proof of Service—Sufficiency.* Under the statutes of this state governing appeals, it is unnecessary that proof of service of a notice of appeal should show where it was served, since service may, by statute, be made either within or without the state, and written admission of service is sufficient, without stating the place and manner of service, as is required in proof of service of summons.—*Id.*..... 660
45. *Objection to Admission of Evidence—Sufficiency.* An objection that transactions and conversations between husband and wife were inadmissible in evidence on the ground of being incompetent, irrelevant and immaterial, is sufficient to afford ground on appeal to urge the specific objection that the matters testified to were inadmissible as being privileged communications, which one spouse is forbidden, under Bal. Code, § 5994, to divulge without the consent of the other.—*Id.*..... 660

See CRIMINAL LAW, 4; JUDGMENTS, 3; LIS PENDENS;
MANDAMUS; NEW TRIAL; REVIEW, WRIT OF.

APPROPRIATIONS. See STATUTES, 2.

ARSON. See STATUTES, 1.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. *Foreign Assignee—Rights of Resident Creditors.* An assignment for the benefit of creditors made in another state in accordance with its statutes, while passing title to the assignor's realty in this state, does so subject to the rights of creditors resident in this state to enforce claims against the assignor by suit and attach-

ASSIGNMENT FOR BENEFIT OF CREDITORS—CONTINUED.

ment against his property in this state.—*Happy v. Prickett* 290

2. *Same—Attachment—Intervention by Foreign Assignee.* A foreign assignee of an insolvent estate has the right to intervene, in a local attachment suit brought by a resident creditor against the assignor's realty in this state, for the purpose of protecting the estate against any illegality or fraud in the claims.—*Id.* 290

ASSIGNMENTS.

1. *Moneys Retained on Government Contract—Breach by Contractor—Completion by Sureties—Rights of Assignee.* An assignment by a contractor of all moneys due or to become due under his contract for a public building, under which twenty per cent. of the moneys earned from time to time was to be retained by the government until the completion and acceptance of the work, passed to the assignee the equitable title in such twenty per cent., and the assignee was entitled thereto as against the sureties on the contractor's bond, by whom the work had been completed after the default of the contractor.—*Fidelity National Bank v. Henley*.. 1
2. *Same—Payment to Sureties—Assumpsit by Assignee Against Sureties.* Where moneys due under a government contract were paid to the sureties on the contractor's bond, who had completed the work on his default, rather than to an assignee to whom they were payable under an assignment by the contractor, of which all parties had notice, an action will lie directly against the sureties by the assignee to recover such moneys, although there is no privity of contract between them, under the rule that where one receives money under such circumstances as make it against conscience that he retain it, even though he has received it under a claim of right, an action for money had and received will lie at the instance of the party to whom it rightfully belongs.—*Id.*..... 1

BANKS AND BANKING.

1. *Insolvency—Superadded Liability of Stockholders—How Determined.* There being no provision in the

BANKS AND BANKING—CONTINUED.

constitution or statutes for the method of determining the superadded liability imposed by art. 12, § 11, of the constitution upon stockholders in banking corporations, the method of its enforcement is necessarily left to be determined by the courts.—*Shuey v. Adair*..... 378

2. *Same—Collateral Attack.* Where a receiver has been appointed by the court to take charge of an insolvent banking corporation, the court has jurisdiction, in an application by the receiver, to make an order fixing the total amount of the superadded liability to be imposed upon the stockholders, and it is within the discretion of the court to find the amount of the deficiency in the assets to meet the claims of creditors before the actual application of the assets to the satisfaction of such claims, and such an order is binding on the stockholders, as against collateral attack, in so far as it determines the amount which may be charged to them as a whole.—*Id.* 378

3. *Same—Action Against Stockholders—Defenses.* When the court charged with the administration of the estate of an insolvent banking corporation has made an order fixing the superadded liability of the stockholders, it has authority to direct the receiver to proceed against the stockholders to enforce the *pro rata* share of each, and in such action any stockholder may set up any defense personal to himself.—*Id.*..... 378

See HUSBAND AND WIFE, 2.

BILLS AND NOTES.

Action on Promissory Note—Proof Admissible Under General Denial. In an action against an indorser upon a promissory note, in which the complaint alleges waiver by defendant of demand and notice, the defendant may, under the general denial, prove that the waiver was not upon the note at the time of its indorsement by him, since it is necessary on plaintiff's part to prove his averment of waiver, and the general denial puts in issue all the material allegations of the complaint.—*Bay View Brewing Co. v. Grubb*..... 163

See PLEADING, 3.

BONDS. See APPEAL, 7-9, 26, 35-38; DAMAGES, 5; GUARANTY; OFFICERS, 2; SHIPPING.

BOUNDARIES. See DEEDS; MINES AND MINERALS, 1, 2.

BROKERS.

Liability to Principal—Action for Conversion—Sufficiency of Complaint. In an action against a real estate broker to recover the difference between the price for which he sold his principal's property and the price which he accounted for, the complaint states a cause of action when it alleges that the plaintiff employed defendant to procure a purchaser for her property at the highest price obtainable; that defendant found a purchaser who was willing to pay a certain sum; that he reported to plaintiff that the purchaser would pay a smaller sum; that a conveyance was made to such purchaser and defendant collected and converted to his own use the difference between the price actually received and that reported by him to plaintiff.—*Stearns v. Hochbrunn* 206

CARRIERS.

1. *Failure to Carry Passengers to Destination—Action for Damages—New Trial—Verdict Contrary to Instructions.* In an action against a carrier for damages for failure to transport plaintiff to a destination contracted for, the refusal of the court to grant a new trial on the ground that the verdict in plaintiff's favor was contrary to the instruction of the court, was not error, where the court charged that it was plaintiff's duty, in case of the inability of the carrier to transport him, either to finish the journey himself or return to the point of embarkation, if either was reasonably practicable, and that he could not recover for loss of time or sickness if he remained unnecessarily at the point where the carrier left him, since the question of whether it was reasonably practicable for plaintiff to return to the point of embarkation or continue to the point of destination was submitted to the jury and by their verdict they found that it was not practicable for him to do either.—*Sloan v. North American T. & T. Co.* 221

CARRIERS—CONTINUED.

2. *Same—Instructions.* Where a transportation company agreed to carry plaintiff to Dawson City by way of the Yukon river, and failed to perform its contract, but, after its failure to carry him further than Fort Yukon, the captain of the steamer represented that he would take him down the river seventy miles, where there was a cabin suitable for occupancy and a good place to cut wood for the winter; and plaintiff was put ashore at that point on condition that he would cut wood for the defendant, and there contracted a cold and severe sickness, permanently impairing his health, by reason of the fact that the cabin was not in a habitable condition, it was not error for the court in an action by him for damages to refuse to charge that plaintiff's sickness was not, under the testimony in the case, such a result of any failure of the defendant to carry him to Dawson as would entitle him to reimbursement, since it was for the jury, and not the court, to say whether, under testimony, the plaintiff's sickness was the result of defendant's failure to carry him to Dawson.—*Id.*..... 221

See DAMAGES, 2.

CERTIORARI. See REVIEW, WRIT OF.

CHATTEL MORTGAGES.

1. *Constructive Notice—Recording in Wrong Record—Water Works System—When Personal Property.* A water works plant and system, with its pipes, mains, fixtures, rights, privileges and franchises, are personal property when the land to which they are attached does not belong to the water works company, and it has but a limited easement in the streets and lands through which its pipes are laid for the delivery of water; and a mortgage thereof, when recorded in the record of real estate mortgages, instead of that of chattel mortgages, does not afford constructive notice, under Bal. Code, §§ 4558, 4559, which provide that a mortgage of personal property is void as against creditors of the mortgagor, or subsequent purchasers or incumbrancers for value and in good faith, unless acknowledged and recorded in the office of the county auditor of the county in which the property is situated, in a book kept exclusively

CHattel Mortgages—Continued.

- for that purpose.—*Dunsmuir v. Port Angeles, etc., Power Co.*..... 104
2. *Payment of Taxes by Mortgagee—Liens.* The holder of a chattel mortgage upon personalty, who pays delinquent taxes thereon acquires no additional lien thereby, by virtue of Laws 1891, p. 322, § 109, which provides that any person who has a lien, by mortgage or otherwise, upon any real property on which the same have not been paid, may pay such taxes, and the same shall constitute an additional lien.—*Id.*..... 104
3. *Priorities—Creditors—Incumbrances.* Under Bal. Code, § 4558, which provides that "a mortgage of personal property is void as against creditors of the mortgagor, or subsequent purchasers and incumbrances of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and it is acknowledged and recorded," one performing labor for the mortgagor with actual knowledge of the existence of an unrecorded chattel mortgage is a creditor and entitled to priority over the mortgagee, even though he may have filed a subsequent lien against the property under the provisions of the employee's act of 1897 (Laws 1897, p. 55), since the fact that lienors, who at one time were creditors, have seen fit to accept the benefit of the law in relation to the enforcement of their claims does not take them out of the category of creditors and place them in that of incumbrancers; the statute contemplating by the term "incumbrancers," those who acquire that position by means of contractual relations and not by operation of law.—*Blumauer v. Clock.*..... 596

See REPLEVIN, 3.

CLAIM AND DELIVERY. See REPLEVIN, 2, 3.

COMMUNITY PROPERTY. See HUSBAND AND WIFE; RECEIVERS, 1-3.

CONSTITUTIONAL LAW.

1. *Class Legislation.* A law giving laborers in certain enumerated industries liens for labor performed does

CONSTITUTIONAL LAW—CONTINUED.

- not constitute special or class legislation in violation of § 12, art. 1, of the constitution, where the law is uniform in its operation and all who are included therein are treated alike.—*Fitch v. Applegate*..... 25
2. *Judgments—Revival of Lien.* The act of March 6, 1897 (Laws 1897, p. 52), relating to the duration of judgments and repealing the existing law which permits the renewal of judgments is unconstitutional and void as to judgments rendered prior to its passage.—*Raught v. Lewis* 47
3. *Privileges and Immunities to Citizens—Exclusive Privileges.* Where a municipality has not by ordinance or contract attempted to give an exclusive right to the use of its streets to a telephone company to whom it had granted an easement therein, its refusal to grant the same rights to another telephone company, under its charter (Bal. Code, § 739, subd. 7), empowering it to authorize or prohibit the use of electricity in or upon any of its streets, would not raise any question as to the violation of art. 1, § 12, of the state constitution, which provides that "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."—*State ex rel. Telegraph Co. v. Spokane* 53
4. *Construction and Operation—Self-Executing Provisions.* Art. 12, § 19, of the state constitution, which declares the right of any corporation or individual to construct and maintain lines of telegraph and telephone upon the streets and highways within the state, that such lines shall be common carriers, and that the right to eminent domain is extended to them, is not self-operative, but by its own terms imposes the duty on the legislature of providing by general law reasonable regulations to give effect to the section, and hence confers no power to use the streets and highways other than as the legislature may provide.—*Id.*..... 53
5. *Obligation of Contracts—Mortgage Foreclosure—Redemption Period—Occupation of Premises by Debtor.* Laws 1899, p. 93, § 15, which provides that in case of

CONSTITUTIONAL LAW—CONTINUED.

the sale on execution of any homestead occupied for that purpose, the judgment debtor shall have the right to retain possession thereof during the period of redemption without accounting for issues or value of occupation is unconstitutional as to foreclosure sales under mortgages executed prior to its passage, when the law in force gave the purchaser on foreclosure sale the right of possession from the day of sale.—*Canadian & American Mtge. & Trust Co. v. Blake* 102

See COUNTIES, 3; MUNICIPAL CORPORATIONS, 6; NAVIGABLE WATERS, 3.

CONTINUANCE.

Sufficiency of Showing Made. A motion for a continuance was properly denied, when the affidavit in support thereof failed to set out the evidence on account of the absence of which the motion was made, and there was no showing that the absent witness would be present at a later trial or that he could be found, or his evidence produced at the trial.—*Shannon v. Consolidated Tiger & Poorman Mining Co.* 119

See CRIMINAL LAW, 10.

CONTRACTS.

1. *Action of Contract—Sufficiency of Evidence.* In an action by plaintiff to recover upon defendant's promise to a third party to pay such third party's debt to plaintiff, a *prima facie* case sufficient to go to the jury is established by evidence showing that such third party held a lease of certain farm lands of defendant, from which he was to have two-thirds of the grain raised by him thereon; that he had agreed to share his portion of the crop with plaintiff, in consideration of the latter's labor in raising the crop; that the lease was subsequently surrendered to defendant on his agreement to pay plaintiff the value of the services performed by him towards raising the crop; and that such services performed by plaintiff were worth \$223.25.—*Dimmick v. Collins* 78
2. *Same—Relevancy of Evidence.* In an action by plaintiff to recover the value of his services in raising a crop of grain for a tenant of defendant, and which, it was

CONTRACTS—CONTINUED.

claimed by plaintiff, but denied by defendant, the latter had agreed with the tenant to pay in consideration of a surrender of the lease, evidence of the condition of the crop at the time of the alleged contract and that it was doubtful whether it would more than pay the costs of harvesting and threshing is admissible as a fact tending to show the reasonableness and probability of defendant's entering into such a contract.—*Id.* 78

See DAMAGES, 3, 4; EVIDENCE, 1; FRAUDS, STATUTE OF; HUSBAND AND WIFE, 3.

CORPORATIONS.

1. *Franchise—What Constitutes.* The right given by statute to form boom companies for the purpose of improving floatable streams, operating booms therein, and charging tolls for logs boomed, constitutes a franchise to any company organized and operated thereunder, although the right possessed by such company may not be an exclusive one.—*Chehalis Boom Co. v. Chehalis County* 135
2. *Foreign Corporations—Service of Summons—Agents Within the State.* Under Bal. Code, § 4854, which provides that an action against a corporation may be brought in any county where the corporation has an office for the transaction of business, or any person resides upon whom process may be served against the corporation, and *Id.* § 4875, subd. 9, which provides that if suit be against a foreign corporation doing business within the state, summons may be served on any agent of the corporation, service of process issued out of the superior court of Clarke county upon a purser and a wharfinger in the employ of a foreign corporation is sufficient, where the company was operating a line of steamers on the Columbia river, which, under the charge of the purser, received and discharged freight and passengers at Vancouver, landing regularly at the wharf there for that purpose, and hence making the wharf an office in this state for the transaction of such business.—*Sievers v. Dalles, P. & A. Navigation Co.* 302
3. *Action by Creditor on Stock Subscriptions—Amendment of Complaint—Substitution of Receiver—Discre-*

CORPORATIONS—CONTINUED.

tion of Court. Where, pending an action at law by a creditor to recover upon an unpaid subscription to the capital stock of a corporation, there being no disclosure of other creditors or of any inadequacy of assets at the institution of the action, a receiver is appointed in a subsequent action on the ground of the corporation's insolvency, the action of the court in allowing the creditor to continue her action for the benefit of all the creditors and ordering the proceeds of the judgment obtained by her to be disbursed by the receiver, was not erroneous, although the court did not direct amendments of the pleadings or a formal substitution of the receiver.—*Dunlap v. Rauch* 620

4. *Corporate Stock—Payment in Property.* Where property is given in payment of a subscription to the capital stock of a corporation, the property must be worth in cash the amount of the subscription for which it is offered; and the estimate of value placed upon such property by the stockholders is not conclusive on the courts.—*Id.* 620

See BANKS AND BANKING, 1-3; PLEADING, 1; TAXATION, 1, 2, 6, 7, 9.

COSTS.

Cost Bill—When May Be Stricken. Where the party in whose favor judgment is rendered neglects for more than ten days to file his cost bill with the clerk, as required by Bal. Code, § 5173, the adverse party is entitled to have the cost bill stricken as to all items except such fees as appear upon the face of the papers.—*Matheson v. Ward* 407

See LIENS, 3.

COUNTIES.

1. *Creation of New County—Necessary Population—Legislative Determination—Presumptions.* Where a new county has been set off from another county, under art. 11, § 3, of the constitution prohibiting the formation of new counties containing a less population than 2,000, the failure of the legislative records to recite the fact that such new county contains a population of not less

COUNTIES—CONTINUED.

than 2,000 would not render the creation of such county illegal, since the legal presumption is that this fact must have been proved to the satisfaction of the legislature and that the passage of the act itself is equivalent to a finding of the necessary facts.—*Farquharson v. Yeargin* 549

2. *Same—Appointment of Provisional County Officers.* Although art. 11, § 5, of the constitution provides for a general and uniform law governing the elections of county officers, a provision in Laws 1899, p. 26, § 5, authorizing the governor to appoint the county commissioners in the newly created county of Ferry, and that they should fill by appointment all other county offices, is not unconstitutional, since the power to fill county offices provisionally in new counties is a necessary incident of the legislative power to create new counties.—*Id.* 549
3. *County Indebtedness—Constitutional Limit—Compulsory Obligations—Salaries.* Warrants issued in payment of salaries of county officers, although in excess of the limit of one and one-half per cent. of the assessed valuation of property, are valid, on the ground of being compulsory obligations imposed upon the county by the constitution and laws of the state.—*Id.* 549
4. *Same—Construction of New Court House.* Warrants issued in payment for the construction of a county court house properly fall under the rule of compulsory obligations when it appears that, at the time such indebtedness was incurred, the county seat was a new mining camp composed of small frame cabins and tents, the town having been recently destroyed by fire; and that it was necessary, for the proper and orderly administration of county affairs, for the protection and safe keeping of the public records, and in order to provide a place to hold court for said county, that a court house should be constructed, since it may be fairly inferred from existing conditions that no suitable building could otherwise be had.—*Id.* 549

See HIGHWAYS, 2.

COURTS.

1. *Jurisdiction of State Courts—Questions Involving Title to Public Lands.* The superior court of this state has

COURTS—CONTINUED.

- jurisdiction, in the absence of any statutory enactment to the contrary, to determine questions between Indians regarding Indian lands within the state, which have been allotted under the treaties and statutes of the United States.—*Bird v. Winyer*..... 269
2. *Rules of Court—Power to Suspend—Presumptions.* The presumption that the trial court acted regularly and upon sufficient cause, in dismissing an action without prejudice, because of plaintiff's failure to file his complaint, is not overcome by the fact that twenty-four hours' notice was not given plaintiff, as required by a rule of the court, since the court has the right, for good reasons, to suspend its own rules.—*Washington Bank of Walla Walla v. Horn* 299
3. *Supreme Court—Original Jurisdiction—Writ of Prohibition—Construction of Constitution.* Art. 4, § 4, of the state constitution, conferring original jurisdiction upon the supreme court to issue the writ of prohibition, must be construed in the light of the law defining the writ of prohibition which was in force at the time of the adoption of the constitution; and the law then in force having restricted the writ to its common-law function for the restraint of unauthorized judicial or *quasi judicial* power, the original jurisdiction of the supreme court is not extended to include ministerial and administrative acts by Bal. Code, § 5769, which provides that the writ of prohibition shall arrest the proceedings of any tribunal, corporation, board, or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person. Original jurisdiction to restrain such acts is in the superior court.—*Winsor v. Bridges* 540
4. *Jurisdiction of Supreme Court—Amount in Controversy.* Mandamus will not lie to compel the superior court to try an action where the amount involved is less than \$200, since the constitutional provision giving the supreme court jurisdiction in mandamus as to state officers must be construed in connection with the provision in the same section prohibiting the appellate jurisdiction of the supreme court, where the amount in controversy is less than \$200.—*State ex rel Wallace v. Superior Court*.. 605

See APPEAL, 2, 32.

CRIMINAL LAW.

1. *Evidence—Declarations as Res Gestae.* In a prosecution for causing death by producing a miscarriage, declarations of the deceased, while preparing to leave home, that she was in trouble and was going to another city to be treated by defendant, are admissible in evidence as verbal acts, explanatory of what she was doing and of her purpose, and as part of the *res gestae* of one portion of the entire transaction, when restricted by the court as competent only to explain the purpose of the deceased in leaving home, and as characterizing her act of going, and explanatory of the nature, character and object of that act.—*State v. Power* 34
2. *New Trial—Newly Discovered Evidence—Diligence.* A defendant convicted of manslaughter as the result of an abortion procured by him was properly denied a new trial on the ground of newly-discovered evidence, because of lack of reasonable diligence on his part in procuring the evidence earlier, when it appeared that the newly-discovered evidence was that of a nurse whom defendant had employed to care for the deceased, that he had been at liberty all the time prior to trial and knew the whereabouts of the nurse, but had never sought and questioned her as to her knowledge concerning matters that would be subject to inquiry at his trial.—*Id.*..... 34
3. *Misdemeanor—Prosecution by Information—Grounds For.* The rule governing in case of prosecutions by information for felony, that the information need not allege the grounds justifying procedure in that form rather than by indictment, but that defendant must urge objections because of the absence of grounds for the filing of an information prior to his plea thereto, is applicable also in prosecutions for misdemeanor by information.—*State v. De Paoli* 71
4. *Order Granting New Trial—Appeal by State.* Under Bal. Code, § 6500, subd. 7, which provides that an appeal shall not be allowed to the state in any criminal action, except when the error complained of is in setting aside the indictment or information, or in arresting the judgment on the ground that the facts stated in the indictment or information do not constitute a crime, or in some other material error in law not affecting the acquittal of a prisoner on the merits, an order granting a

CRIMINAL LAW—CONTINUED.

- new trial to the defendant would not be appealable on the part of the state.—*State v. Johnson* 75
5. *New Trial—Discretion of Court—False Answers by Juror.* The refusal of the court to grant a new trial on the ground that a juror had testified falsely on his *voir dire* as to having formed an opinion of guilt previous to the trial cannot be regarded as an abuse of discretion merely from the fact that two persons make affidavit thereto in opposition to the affidavit of the juror alone.—*State v. Hall* 255
6. *Evidence—Similar Offense.* In a prosecution of defendant for horse stealing, it is error to admit testimony showing that he had stolen another horse at about the same time with the one for whose theft he was standing trial, where the two transactions are not so woven together as to constitute interdependent crimes, but the sole effect of the testimony would be to establish the bad character of defendant and prejudice the jury against him.—*State v. Gottfreedson* 398
7. *Harmless Error—Examination of Juror.* The refusal of the court to permit counsel to ask a juror whether he would look upon the defense of intoxication with any degree of disfavor, if error at all, was cured by permitting counsel subsequently to propound the question, "should the defense consist in part of emotional or hereditary insanity, aggravated, inflamed, and rendered acute by the excessive use of intoxicating liquors, would you regard that kind of defense with any disfavor or prejudice?"—*State v. Royse* 440
8. *Same—Difference Between Opinion and Impression.* When an attorney in examining a juror as to his qualifications states that there is no difference between having an opinion and an impression as to defendant's guilt or innocence, it is a misstatement of the law, and it is not error for the court to interfere with the examination for the purpose of correcting the statement and instructing the juror to the contrary.—*Id.* 440
9. *Premature Arraignment and Plea—Harmless Error.* Error of the court, if any, in arraigning defendant in a criminal prosecution and compelling him to enter his plea before procuring counsel is cured by the subsequent

CRIMINAL LAW—CONTINUED.

action of the court, after the appointment of counsel, in allowing the plea to be withdrawn and the validity of the information to be attacked by demurrer and motion to quash.—*State v. Boyce* 514

10. *Continuance—Discretion of Court.* The refusal of the court to grant a continuance in a criminal prosecution does not show an abuse of the discretion vested in it, when it appears that several of the witnesses, including those absolutely necessary to the defense, for whom the continuance was asked, were present at the trial, and that other witnesses were obtained from localities where the witnesses lived who were mentioned in the affidavit for continuance, and who testified substantially to all that it was claimed in the affidavit the witnesses desired would testify to.—*Id.*..... 514
11. *Witnesses—Experts—Competency.* The action of the court in overruling an objection to the competency of a witness as an expert upon questions of insanity is not error, when the record shows that, although the witness stated he did not like the word "expert" and did not call himself an expert, yet he was a practicing physician; that he had examined people a great many times and even deprived them of their liberty in an asylum by his knowledge of insanity, though not assuming to be a specialist on that subject.—*Id.*..... 514
12. *Comments by Court on Qualifications.* Comments by the court upon the qualifications and competency of a witness offered as an expert do not constitute error, when the comments were made in answer to objections by the attorneys, in passing upon the qualifications of the witness.—*Id.* 514
13. *Same—Hypothetical Questions—Harmless Error.* Where objection was made that a question propounded to a witness was not a hypothetical question, because not based upon the evidence in the case, the ruling by the court that it was a question for the jury and not the court to decide, if error, was without prejudice, when it plainly appeared from the record that the question was founded upon the testimony.—*Id.*..... 514
14. *Argument of Counsel—Reference to Matters Not in Evidence—When Proper.* It is not improper for the attorney for the state, in his closing argument to the jury,

CRIMINAL LAW—CONTINUED.

- to advert to matters that defendant's attorney in his opening statement claimed they would prove, and call attention to the fact that no evidence had been introduced upon those points.—*Id.*..... 514
15. *Same—Instructing Jury Against Improper Argument.* Where the court informs the jury that the remarks of counsel are not proper, it is equivalent to an order withdrawing the remarks from their consideration, and no error can be based upon the improper argument.—*Id.*... 514
16. *Bailiffs—In Charge of Jury—Recitals of Record.* Where the record shows that the jury retired in charge of a sworn bailiff, it is a sufficient showing that the bailiff was sworn to take charge of the jury in accordance with the statute.—*Id.*..... 514
17. *Misconduct—Removing Jury from One Room to Another.* The taking a jury from one part of a court house to a more comfortable room in the same building, after they had agreed on their verdict, but before it was received, does not constitute such a separation of the jury as to be misconduct on the part of the bailiff.—*Id.*..... 514
18. *Accused as Witness—Remarks of Counsel.* Where a defendant charged with distributing an indecent picture offered himself and was sworn as a witness, but gave no testimony because the questions asked by his counsel were not admitted, it is not error for the prosecution to refer in argument to his offer to testify and make the comment that he made no denial of the indecency of the picture.—*State v. Ulsemer* 657
19. *Same—Instructions as to Credibility.* Where a defendant is sworn as a witness in his own behalf, it is not error for the court to charge that the testimony of the defendant should be weighed as that of any other witness, even though he did not testify because of the refusal to admit the testimony which his counsel endeavored to elicit and the denial of the right of cross examination on the part of the state.—*Id.*..... 657

See FALSE PRETENSES; HOMICIDE; INDICTMENT AND INFORMATION; INFANTS, 2; INTOXICATING LIQUORS; JURY, 1-9; OBSCENITY; ROBBERY; STATUTES, 1.

DAMAGES.

1. *Excessive Damages.* In an action for personal injuries a verdict for \$8,500 cannot be said to be so excessive as to indicate passion and prejudice on the part of the jury, when it appears that plaintiff was a young man, that, in addition to the suffering which he endured and the expense incurred, his foot was so badly mashed through defendant's negligence that it was necessary to remove a portion of the bones, leaving him permanently maimed.—*Uren v. Golden Tunnel Mining Co.*..... 261
2. *Same.* In an action to recover damages against a navigation company for breach of a contract of carriage, and for injuries arising from the negligent and wrongful and forcible landing by defendant of an aged woman at a wrong destination, and the carelessness of defendant's agents in the manner of putting her off upon a barren island, exposed to the inclemency of stormy weather, from which they failed to rescue her, but allowed her to make her way home as best she could, which she did after two days' travel, incurring sickness and great bodily discomfort from her exposure, a verdict for \$600 does not indicate passion or prejudice on the part of the jury.—*Sievers v. Dalles, P. & A. Navigation Co.*..... 302
3. *Measure of Damages—Breach of Contract.* In an action to recover damages for breach of contract to construct and operate an electric railway, an allegation that plaintiff was the owner of a large amount of real estate, laid off into lots and blocks, and suitable only for suburban residences; that, as defendant well knew, his purpose in entering into the contract was to increase their value and make them available as city property; and that the difference in value between such property with and without said extension was \$25,000, is a sufficient allegation of the measure of damages to which plaintiff is entitled, since the proper measure of damages is the difference between the value of the land if the contract had been carried out, and its value with the contract unfulfilled.—*Belt v. Washington Water Power Co.*..... 387
4. *Same—Pleading—Allegation of Non-Payment.* In an action to recover damages, an allegation of the damages sustained, together with a prayer for judgment thereon, is sufficient as an allegation of the non-payment of the damages.—*Id.*..... 387

DAMAGES—CONTINUED.

5. *Action on Bond—Whether Damages Liquidated or in Nature of Penalty.* A bond in the sum of \$3,000, conditioned that the obligor shall build or cause to be built upon certain premises within a given time a house which shall cost not less than \$2,000, and that he will pay all liens or incumbrances thereon which may be, or threaten to become, prior to a mortgage thereon in favor of the obligee, contemplates that the sum named in the bond shall be in the nature of a penalty and not liquidated damages.—*Johnson v. Cook*..... 474

See APPEAL, 27; GUARANTY; HUSBAND AND WIFE, 5;
LIMITATION OF ACTIONS, 2; MASTER AND SERVANT,
2; NAVIGABLE WATERS, 5; PLEADING, 6.

DEEDS.

- Description—Construction—Lands Between High and Low Water of Bay.* Where a conveyance of land abutting upon an arm of the sea describes the line as running "to Duwamish Bay; thence northerly, following the meandering of said bay," the conveyance must be construed as passing title to the tide land lying between the lines of high and low water, in the absence of anything in the deed indicating an intention to reserve the strip of land lying beyond the high water line.—*Maynard v. Puget Sound National Bank* 455

See EVIDENCE, 3.

DESCENT AND DISTRIBUTION. See INDIANS.

DISMISSAL AND NONSUIT.

1. *Dismissal of Action—Right When Affirmative Relief Demanded in Answer.* Under the code procedure, whether the action be of legal or equitable cognizance, the plaintiff has no right to dismiss his action, when a counterclaim has been set up and affirmative relief demanded by the defendant. (*Waite v. Wingate*, 4 Wash. 324, overruled as to this point.)—*Washington National Building, Loan & Investment Ass'n v. Saunders* 321
2. *Same—Failure to Prosecute—Pendency of Demurrer.* The refusal of the court to dismiss an action for want of

DISMISSAL AND NON-SUIT—CONTINUED.

prosecution is not error, while a demurrer to the complaint is pending and undetermined.—*Bignold v. Carr*... 413

See APPEAL, 18, 19; COURTS, 2; PLEDGES.

DIVORCE.

1. *Service by Publication—Affidavit—Sufficiency.* Under Bal. Code, § 4877, authorizing summons by publication in actions for divorce, when defendant cannot be found in the state, upon the filing of an affidavit by plaintiff or his attorney, stating he believes defendant is not a resident of the state, and alleging the existence of one of the cases specified in the state in which publication is permissible, the affidavit in support of service by publication is sufficient, although it states conclusions instead of probative facts, and although it makes no reference to the property of the parties, since the disposition of the property is a mere incident of the divorce and follows from the action itself.—*Goore v. Goore* 139
2. *Same—Summons—Description of Property Involved.* Where a summons by publication in an action for divorce notifies defendant that one of the objects of the action is to procure "the equitable distribution to plaintiff of the property, real and personal, of plaintiff and yourself," it is sufficient to notify the defendant that the disposition of his separate property, as well as that of the community, is contemplated, since the court has jurisdiction in divorce to dispose of all the property of the parties described in the complaint.—*Id.*..... 139
3. *Cruel Treatment—Pleading—Conclusions.* A complaint for divorce on the ground of cruel treatment is demurrable for want of facts when the allegations that defendant is quarrelsome and vicious in disposition and murderous in threats against plaintiff and his mother are mere conclusions, without any specification of what defendant's acts or threats were, or how or when made, and when in none of the allegations setting up cruel treatment is there any specification of such facts as tend to establish injury to the health or person of plaintiff.—*Stanley v. Stanley* 460
4. *Same—Inability to Live Together.* Under Bal. Code, § 5716, which provides that "a divorce may be granted

DIVORCE—CONTINUED.

upon application of either party for any other cause deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together," the mere fact that plaintiff believes he and defendant can no longer live together affords no legal cause for divorce.

—*Id.*..... 460

5. *Same—Sufficiency of Evidence—Non-Suit.* In an action for divorce on the ground of cruel treatment, plaintiff should be non-suited, where his testimony shows that he was fully acquainted with the character of defendant prior to marriage, that he had failed to provide for her, that they lived together only about five months after marriage, that he abandoned her within one week after the birth of their child, and that her threats against his life and that of her child were called forth by his refusal to live with her again.—*Id.*..... 460

ELECTION OF REMEDIES.

Estoppel. The fact that, in an attempt to collect the damages now sought to be recovered, defendant had been sued upon a bond which it had given as security for the contract now in controversy, and that the suit had been decided in defendant's favor, because the provision in relation to unliquidated damages had not been authorized, would not estop plaintiff from pursuing another proper and effective legal remedy.—*Belt v. Washington Water Power Co.*..... 387

ESTOPPEL.

Grounds of—Acts Done in Reliance on Conduct of Another.

Where one of the owners of premises refers an applicant for a lease thereof to another of the owners, with the statement that the latter had the management of the property, and whatever arrangement was made with the latter would be satisfactory, and such applicant, relying upon the representation of both such owners as to the latter having full power and authority to make the lease, enters into a verbal lease of the premises with the latter, and expends money in their improvement, the owners are estopped to deny the validity of the lease.—

Brown v. Baruch 572

See ELECTION OF REMEDIES; PLEADING, 5; TRIAL, 12.

EVIDENCE.

1. *Variation of Written Contract—Contemporaneous Oral Agreement.* Parol evidence is admissible for the purpose of showing that, by a contemporaneous oral agreement, a written contract between the parties providing for payments of money had been so far modified as to permit the stipulated payments to be rendered in services instead of money.—*Johnston v. McCart* 19
2. *Action for Personal Injuries—Permanency of Injury—Pleading and Proof.* The admission of testimony by physicians that plaintiff in an action for personal injuries would probably never recover his health again was not erroneous, under a complaint alleging that he would be incapacitated from doing his work for the period of two years, when the complaint further alleges that plaintiff was permanently injured and would continue to suffer for the remainder of his natural life great bodily pain and mental anguish.—*Taylor v. Ballard*.... 191
3. *Parol—Admissible to Identify Description in Deed.* Under the rule that parol evidence is admissible to identify the property described in and conveyed by a deed, in order to ascertain to what property the particulars of description in the deed apply, it is permissible to prove by parol that a tract of land described in a deed as "lot 6" was intended to include an unnumbered fractional lot adjoining.—*Newman v. Buzard* 225
4. *Action on Judgment—Authentication of Record.* The clerk of the court being the custodian of its records, according to the statutes, a judgment record offered in evidence, certified by the clerk, is sufficient without any certificate of the judge that the clerk is the custodian of the records.—*Bignold v. Carr* 407
5. *Hearsay—Admissibility as Res Gestae.* In an action to recover a mining claim, in which the issue was as to whether plaintiff and its assignors had performed the necessary amount of development work for the year 1898, the testimony of a witness that one of the original owners had pointed out to him the work done on the claim in 1898 is hearsay evidence, and is not admissible, even on the ground of being part of the *res gestae* surrounding the negotiations for the purchase of the claim, since the matter in contention was whether the requi-

EVIDENCE—CONTINUED.

- site amount of work had been done, and the negotiations for the purchase of the claim were not in dispute.—*Spo-
kane v. Vancouver G. & C. Co. v. Colfelt* 568
6. *Same*. The admission of testimony by the witness who had given hearsay testimony as to the development work of 1898 having been pointed out to him by the person who claimed to have done the work, that he had made efforts to procure the attendance of such person at the trial, but was unable to secure him as a witness, was erroneous, since the incompetency of hearsay evidence cannot be cured by showing that a witness who will testify to the fact cannot be found.—*Id.* 568
7. *Opinions of Expert*. Where a witness has qualified as a physician and surgeon, familiar with fractures and with the X-ray process of determining the existence of a fracture, he is competent to testify as to his opinion as to an alleged fracture of plaintiff's leg, based upon an X-ray negative of the injured limb taken by himself.—*Miller v. Dumon* 648
8. *X-Ray Photographs*. An X-ray photograph is admissible in evidence, when verified by proof that it is a true representation of an object which is the subject of inquiry.—*Id.* 648

See CONTRACTS, 2; CRIMINAL LAW, 1, 6; HOMICIDE, 3; OBSCENITY, 3; PRINCIPAL AND AGENT, 2.

FALSE PRETENSES.

1. *Defenses—Partnership*. An executory contract for the division of profits on the sale of goods does not constitute a partnership, so as to exonerate from the crime of larceny one of the parties thereto who fraudulently obtains such goods from the other party by false pretenses.—*State v. Mendenhall* 12
2. *Same—Agency*. A person who by false and fraudulent pretenses obtains the goods of another cannot escape liability for his crime on the ground that he acted merely as an agent in procuring possession of the goods for his principal.—*Id.* 12

FISHERIES.

1. *Fishing Site—Abandonment—Right of Re-Location.* Laws 1897, p. 218, § 7, which provides that, if the holder of a fishing license, who has indicated a location for his trap or pound net by driving piles and posting his license number, "fails to construct his appliance during the fishing season covered by his license, such location shall be deemed abandoned," does not preclude one who has abandoned a fishing site from re-locating thereon for the next fishing season, when no other person has acquired a prior claim thereto between the time of his abandonment and his re-location.—*Legoe v. Chicago Fishing Co.* 175
2. *Same—Priorities.* Under Laws 1897, p. 218, § 7, which provides "that any person or corporation, after having obtained a license as provided for in this act, shall indicate locations for traps or pound nets made under such license, by driving at least three substantial piles thereon, which must extend at least ten feet above the surface of the water at high tide, one of said piles to be driven at each end of the location claimed, and upon said terminal piles there must be posted the license number," the plaintiff, who on the afternoon of March 16th placed temporary poles on the beach while the tide was out and posted his license number thereon, and three days later drove substantial piles farther out, did not thereby acquire a superior right over defendant, who, on the evening of March 16th, posted its license number on its own piles already on the site, when the defendant had on the morning of that day been engaged at the site in making tests of the course of the tides by means of lines and floats, preparatory to fixing a pound net at that place, the acts of the defendant thus being as effective as those of the plaintiff to indicate an intention to make a fishing location on the site, and the defendant being actually first in time to indicate its intention and also to literally comply with the statute.—*Id.*..... 175
3. *Same—Indicating Location—Statutory Requirements* The act of a locator of a fishing site in posting its license number upon its own piles, driven upon the site in prior years, constitutes a literal compliance with the requirement of the statute that locations for pound nets shall be indicated "by driving at least three substantial piles thereon," and posting the license number upon the terminal piles, since the statute does not require the act

FISHERIES—CONTINUED.

- of driving the piles and the act of posting notices thereon to be concurrent.—*Id.*..... 175
4. *Fishing Site—Abandonment—Re-location.* The failure of a locator of a fishing site to construct a trap thereon during the fishing season covered by his license, under Laws 1897, p. 214, § 7, does not constitute such an abandonment of the location as to disqualify the licensee from relocating the same for the next fishing season.—*DeMers v. Sandy Spit Fish Co.*..... 582
5. *Location of Traps—Sale—Caveat Emptor—Rights of Purchaser.* Where plaintiff purchased at a receiver's sale one of two fish traps owned and operated by defendant, with actual knowledge that the two locations were within the lateral limits allowed by statute, the rule of *caveat emptor* applies, and plaintiff having purchased with knowledge of the defect must be satisfied therewith, and is not entitled to enjoin defendant from operating its remaining trap within the statutory distance of 2,400 feet from the one purchased by plaintiff, but its remedy is restricted to restraining defendant from moving its trap location closer than it was at the time of sale.—*Fall & Sockeye Fish Co. v. Point Roberts Fishing & Canning Co.*..... 630

FORCIBLE ENTRY AND DETAINER. See LANDLORD AND TENANT.

FRAUD. See LIMITATION OF ACTIONS, 3, 4.

FRAUDS, STATUTE OF.

1. *Payment of Another's Debt as Original Promise.* An agreement to pay the debt of another as consideration for another contract between the promisor and promisee is not within the statute of frauds.—*Dimmick v. Collins* 78
2. *Promise to Pay Debt of Another—When Constitutes Original Promise.* A promise by a debtor to pay the debt of his creditor to a third party, made in consideration of receiving credit upon his own indebtedness, is an original promise, and not within the statute of frauds.—*Nordby v. Winsor* 535

FRAUDULENT CONVEYANCES.

Action to Cancel—Sufficiency of Evidence. In an action to set aside a fraudulent conveyance a finding of fraud is not supported by the evidence, when it appears therefrom that the grantor, about a year prior to the institution of a suit against him to enforce a stock subscription, left the state, leaving no property therein subject to execution, other than the lands in controversy, which he at that time conveyed to another in trust for a third person, but had continued for some time after the transfer to receive rents from a tenant on the premises, when the *cestui que trust* testified that he paid a valid consideration for the land, specifying the manner of payment, which was corroborated both by the grantor and the trustee, and there were no facts or circumstances in evidence impeaching the veracity of the witnesses who denied the fraud.—*Troy v. Bickford* 159

GARNISHMENT. See **APPEAL**, 12.

GUARANTY.

Bond Given as Guaranty—Liability After Exhaustion of Prior Security. Where a bond conditioned that the obligor will build a house of an agreed value upon mortgaged premises within a stipulated time is given as additional security for the mortgage thereon, in an action on the bond for breach of the condition to build the obligee is not entitled to other than nominal damages, when the mortgaged premises have not been sold under foreclosure and the amount of deficiency determined.—*Johnson v. Cook*..... 474

HIGHWAYS.

1. *Prescriptive Right—Interruption of Use by Public.* A title by prescription to a highway did not inure to the benefit of the public from the fact that the public had been permitted for a number of years to travel a road across private premises, and that that portion of the road had been worked by the county during the absence of the owner, when there were distinct acts on the part of the owner, prior to the maturing of a prescriptive right, indicating an intention not to dedicate a highway, such as maintaining gates across the road, and posting notices thereon that it was private property, and de-

HIGHWAYS—CONTINUED.

- manding that the gates be kept shut.—*Megrath v. Nickerson* 235
2. *Same—Laying Out—Validity.* The fact that viewers appointed by the county commissioners to survey a road in pursuance of a petition therefor continue the survey beyond the limits set by the petition would give no authority to the county to establish a road beyond the point named in the petition.—*Id.*..... 235

HOMESTEAD.

Homestead in Decedent's Estate—Order Setting Aside in Spouse's Separate Property—Effect Upon Title. A homestead set aside by the court, under Bal. Code, §§6219, 6222, to the widow and minor child of a decedent does not vest the title to such homestead in them, when the land exempted as a homestead was the separate property of the decedent; but such sections must be construed in connection with § 5246, by which it is provided that if a homestead was selected from the community property, the land vested in the survivor upon the death of either spouse, and "in other cases, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent."—*Austin v. Clifford*..... 172

SEE CONSTITUTIONAL LAW, 5.

HOMICIDE.

1. *Manslaughter—Sufficiency of Information—Allegations Setting up Criminal Abortion.* Under Bal. Code § 7042, which provides that every person who shall unlawfully kill any human being without malice, involuntarily, but in the commission of some unlawful act, shall be deemed guilty of manslaughter, an information charging manslaughter is sufficient thereunder, although it sets up facts constituting the offense of producing a miscarriage, the punishment for which is provided in Bal. Code § 7068, when such facts are pleaded only for the purpose of charging the killing as having been done in the commission of a prohibited offense and there is no punishment provided in the statute against

HOMICIDE—CONTINUED.

- producing miscarriages where death results from the commission of such acts.—*State v. Power*..... 34
2. *Same—Instructions—Liability of Physicians for Gross Neglect.* In a prosecution for manslaughter as the result of a criminal abortion, where the evidence tends to show that the physician had neglected to take proper sanitary precautions in the care of the deceased, a charge to the jury that “when a physician undertakes to attend a sick person, the law imposes upon him the duty of directing the sanitary conditions surrounding the patient, of prescribing the proper medicines and the times and manner of taking, and whatever other appliances and operations necessary to the restoration of health,” is applicable to one phase of the case, but does not undertake to define the degree of care and skill required of a physician; and such charge is not misleading when the instructions elsewhere charge the jury as to the criminal liability of a physician for wilful and felonious neglect of a patient.—*Id.*..... 34
3. *Evidence—Dying Declarations—In Extremis.* The fact that dying declarations were made two days prior to the death of the person making them would not render the declarations inadmissible in evidence, since the rule requiring it to be shown that the declarations were made while the declarant was *in extremis* does not require that the declarant be actually breathing her last, when making them, but the rule is satisfied where it is shown that the declarant died in the course of the illness from which she was suffering at the time they were made and that the illness from which she was suffering was the direct and proximate result of the original injury which the declarations tend to illustrate.—*Id.*..... 34
4. *Same—Sense of Impending Death.* Dying declarations are admissible in evidence when the court is satisfied from all the facts and circumstances shown that they were made under the sense of impending death, notwithstanding declarant may not have said in specific terms that she was without hope of recovery, or was dying, or going to die, or could not live any longer.—*Id.*.... 34
5. *Identification of Body—Conclusiveness of Jury's Finding.* In a prosecution for murder, in which the identity

HOMICIDE—CONTINUED.

of the dead body is a question in issue, for the reason that the flesh of its face had been eaten away beyond recognition, the verdict of the jury establishing identity of the body with that of the alleged murdered man is conclusive on the appellate court, when it appears that the deceased was last seen alive near the point where the body was discovered, that the body corresponded with that of deceased in stature, size and hair, that the clothing on it was similar to that worn by deceased when last seen alive, and that a button on the shirt was identified by a witness as having been given by him to deceased some months before.—*State v. Downing*..... 340

6. *Circumstantial Evidence—Sufficiency.* In a prosecution for murder, the jury is not warranted in finding defendant guilty, when the evidence shows that deceased was last seen alive rowing his boat in the direction of defendant's shack, that ten days later his overturned boat was found adrift and two days subsequently his body was found partially embedded in the sand on the beach, about a mile and a half from defendant's shack; that by reason of decomposition and the feeding of crabs and gulls on the exposed portions of the face and neck it was difficult to tell whether violence had been used against deceased, but some of the persons witnessing the body were under the impression that the throat had been cut; that the defendant and deceased had theretofore had some slight quarrel over trivial matters, but there was no proof of bad blood between them; and there were no indications of the use of violence in or about the shack or the deceased's boat, nor was there any evidence of blood upon the clothing or boat of deceased, or upon the clothing or person of defendant nor upon the contents of his shack.—*Id.*..... 340
7. *Murder in First Degree—When Question for Jury.* Where the testimony of eye witnesses to a homicide tends to show malice, premeditation and deliberation on the part of the accused, it is proper for the court to refuse to take from the consideration of the jury the question of murder in the first degree.—*State v. Boyce*.. 514

SEE CRIMINAL LAW, 1, 2.

HUSBAND AND WIFE.

1. *Lands Purchased After Marriage—When Separate Property.* The presumption that lands acquired by purchase after marriage are community property is overcome in a case where it appears that the husband, prior to marriage, had accumulated over \$23,000 worth of land in the business of buying, improving and selling real estate, of which he sold about \$20,000 worth within a year after his marriage and bought other land with the proceeds, including that in controversy, without the use of any money of his wife or of the community in the purchase of the same.—*Austin v. Clifford*..... 172
2. *Community Liability on Corporate Stock.* Where a subscription by the husband to the capital stock of a banking corporation was for the benefit of the community, the superadded liability imposed on stockholders in cases of insolvency is one which may be enforced against community property.—*Shuey v. Adair*..... 378
3. *Parties—Breach of Contract for Enhancement of Value of Community Realty.* The husband being charged by statute with the management and control of community property, the wife is not a necessary party to an action for breach of a contract made by the husband, which, if performed by defendant, would have been instrumental in increasing the value of their community realty.—*Belt v. Washington Water Power Co.*..... 387
4. *Separate Character of Property—Sufficiency of Evidence.* In an action where the issue was as to the community or separate ownership of real estate, the evidence was sufficient to establish the wife's separate ownership therein, when it appeared that her husband had declined to purchase the lots in dispute from a would-be vendor, but referred the vendor to his wife as having money to invest; that the wife bought the lots with \$1,000 in money given her by her son out of the proceeds of her former husband's estate and with \$700 given her by her then husband, and built thereon houses costing \$5,000 with money also given her by her husband; that the husband acquired considerable real estate after marriage, but this was the only parcel directly conveyed to the wife; that he always referred to it as her property and she dealt with the agents who had charge of it, receiving the rents herself and arranging for repairs.—*Sackman v. Thomas*..... 660

HUSBAND AND WIFE—CONTINUED.

5. *Action for Injuries to Wife—Measure of Damages—Husband's Loss of Time Nursing Wife.* Where a husband seeks to recover for his services in attending his wife on account of injuries received through defendant's negligence, the measure of his damages is not the amount of money he might have made if he had pursued his own vocation during the time he was so employed, but his damages would be measured by the value of the services of a competent nurse for the time the husband was so engaged.—*Howells v. North American T. & T. Co.* 689

See APPEAL, 45; DIVORCE; HOMESTEAD; RECEIVERS, 1-3; TRIAL, 12; WITNESSES, 3.

INDIANS.

Public Lands—Allotment to Indians—Nature of Title—Right of Inheritance. Under the sixth article of the treaty of 1854 with the Nisqually and other tribes (10 U. S. St. at Large, 1044), which provides that the president may assign to each Indian family of two, one quarter section of land, to each family of three and not exceeding five, one half section, and to larger families, more in proportion, if such Indians will locate on the same as a permanent home; may issue patent therefor conditioned against power of alienating the lands; and may cancel the assignment in case such family neglect to occupy and till a portion of the assigned lands, nothing passes by patent except the right of possession and occupancy of the lands described, but the absolute fee remains in the government, and hence, upon the death of the wife, no rights would pass by inheritance to the children of the wife by a former marriage, where an assignment of a quarter section had been made to her husband as the head of a family composed of himself and wife, and the land granted to him as the head of said family and to his heirs.—*Bird v. Winyer.* 269

SEE COURTS, 1.

INDICTMENT AND INFORMATION.

1. *Conviction of Lesser Offense Included in Charge—Instructions.* Under an indictment or information charging robbery, the defendant may be convicted of the lesser offense of larceny, and, where the evidence tended to

INDICTMENT AND INFORMATION—CONTINUED.

show a larceny rather than a robbery, it was error for the court, upon a prosecution for robbery, to refuse to instruct on the crime of larceny as included within the charge of robbery.—*State v. Dengel*..... 49

2. *Sufficiency of Information—Date of Offense.* The failure to allege the exact date of the commission of a crime is not ground of demurrer against an information, where a date within the statute of limitations is alleged as the time of its commission.—*State v. Gottfreedson*..... 398

3. *Prosecution by Information.* While certain facts must exist in order to warrant prosecution by information, it is not necessary that the existence of such facts should appear upon the face of the information.—*State v. Boyce*. 514

SEE CRIMINAL LAW, 3; HOMICIDE, 1; INTOXICATING LIQUORS; OBSCENITY, 1; ROBBERY.

INFANTS.

1. *Action by—Guardian ad Litem—Appointment of Non-Resident.* Where a non-resident parent and minor children submit themselves to the jurisdiction of this state by instituting a joint action in one of its courts, it is not error for the court to appoint the parent as guardian *ad litem* for such minors, since Bal. Code, § 4832, provides that when an infant is a party, if he has no guardian, the court shall appoint one to act, and there is no provision requiring a guardian *ad litem* to be a resident of the state.—*Shannon v. Consolidated Tiger & Poorman Mining Co*..... 119

2. *Commitment to Reform School—Vagrancy—Sufficiency of Evidence.* The commitment of boys between the ages of eight and fifteen years to the reform school on the ground of vagrancy, under Bal. Code, § 2724, is unwarranted, when there was no testimony before the court showing they were guilty of vagrancy, or mendicancy, or incorrigibility, or had been convicted of crime, and the testimony introduced showed merely that the house in which they lived was very dirty, the mother being dead and the father away t work most of the day; that the boys were not clothed as well as some other boys in the community, but that they had plenty to eat; that on one occasion they had, with some other boys, broken into

INFANTS—CONTINUED.

a house in the neighborhood, but there was nothing in testimony showing how long before; and when the testimony in their behalf showed that they attended school regularly, were not of quarrelsome dispositions, and were regarded by some of the witnesses as good boys. *State v. Rasch*..... 332

3. *Parties—Infancy—Waiver of Objection.* The objection that parties to an action are minors, who appear without guardians *ad litem*, cannot be raised by the adverse party after pleading to the merits.—*Blumauer v. Clock*.. 596

SEE INTOXICATING LIQUORS.

INJUNCTION. SEE APPEAL, 39; TAXATION, 3, 8.

INSOLVENCY. SEE BANKS AND BANKING, 1-3; RECEIVERS.

INSTRUCTIONS. SEE CARRIERS, 2; CRIMINAL LAW, 8, 15, 19;

HOMICIDE, 2; INDICTMENT AND INFORMATION, 1;
MUNICIPAL CORPORATIONS, 3; OBSCENITY, 2; STREET
RAILROADS, 3; TRIAL, 1, 5, 8, 10-12.

INSURANCE.

Action on Policy—Pleading and Proof—Variance—Materiality. Where the complaint in an action upon an accident policy to recover for the death of the insured alleged that he fell and bruised his left side, directly over the heart, and died as a direct result of such injury, and a bill of particulars filed in connection with such complaint alleged that the death of the insured was caused by the injuries to his side, and the character of the injuries causing his death were described as being a bruise and injury upon the side directly over the heart, causing a malignant growth of spleen and fatty degeneration of the heart, the ultimate fact alleged is that the death was caused by the injury to his side, and the pleader's conclusion that the injury produced malignant growth of spleen and fatty degeneration of the heart, while the evidence showed that the injury produced inflammation of the pericardium instead, would constitute but an immaterial variance, which could not have misled the defendant to its prejudice.—*Mercier v. Travelers' Ins. Co.* 147

INTEREST.

- Interest—When Begins to Run—Open Account.* Interest at the legal rate begins to run on an open account for services rendered from the date of full performance, at which time the right to compensation fully accrued.—*Happy v. Prickett*..... 290

INTERVENTION. SEE ASSIGNMENT FOR BENEFIT OF CREDITORS, 2; VENUE.

INTOXICATING LIQUORS.

- Selling Liquor to Minor—Sufficiency of Information.* An information which charges that defendant "did wilfully, unlawfully and knowingly sell and give intoxicating liquor," to a minor, sufficiently charges that defendant had knowledge of the minority of the purchaser, and the word "knowingly" is not referable to the act of selling the liquor alone, but imports knowledge of the thing done as well as an evil intent or bad purpose in doing such thing.—*State v. De Paoli*..... 71

JUDGES.

- Trial Before Judge of Another County—Where Findings May be Signed.* Although it is necessary under the statutes, that the trial of an action must be had in the proper county, yet there is no law requiring the judge who tried the case to sign the findings and judgment in the county where it is pending.—*Matheson v. Ward*..... 407

JUDGMENTS.

1. *Petition for Vacation—Sufficiency of Allegations.* Where judgment has been rendered discharging an insolvent debtor, it will not be vacated upon the petition of a creditor whose petition does not allege that he presented his claim against the estate and brought himself within the statute, so far as the duty of a creditor is concerned; nor that he is otherwise interested in the judgment rendered; nor that, in case of its vacation, the subsequent proceedings would not result in the same judgment.—*Kuhn v. Mason*..... 94
2. *Vacating—Laches of Petitioner.* Although Bal. Code, § 5156, requires proceedings for the vacation of judgments to be brought within one year after their rendi-

JUDGMENTS—CONTINUED.

- tion, the right to grant or deny the petition is discretionary with the trial court, and its refusal to grant a petition to vacate when the year of limitation was within three days of expiration would not constitute abuse of discretion, where there is no showing of diligence on the part of the petitioner, nor of any reason why he had not proceeded earlier.—*Id.*..... 94
3. *Same—Improper Remedy for Reviewing Errors of Law.* Bal. Code, § 5153, subd. 3, which authorizes a court to vacate or modify its judgment after the term at which it was rendered, for "irregularity in obtaining the judgment or order," does not contemplate that errors of law committed by the court may be corrected by motion to vacate, since the proper remedy in case of such errors is an appeal from the judgment.—*Id.*..... 94
4. *Action on Deficiency Judgment—When Statute Commences to Run.* Where the entry of a deficiency judgment was made within six years of action thereon, it is not barred (conceding the six years' limitation is applicable to domestic judgments), although judgment of foreclosure upon which the deficiency judgment was based may have been entered more than six years prior to the commencement of action upon the deficiency judgment.—*Bignold v. Carr.*..... 407
5. *Same—Joint Judgment—Action Against One Debtor.* Under the rule that action upon a joint judgment may be maintained against one of the judgment debtors alone, the introduction in evidence of a record showing a judgment against defendant and another, while the complaint states a cause of action against defendant alone, does not constitute a failure of proof.—*Id.*..... 407
6. *Revivor—Parties.* Code Proc. § 462, subd. 1, which requires a motion to revive a judgment to "state the names of the parties to the judgment," does not contemplate that the motion state the names of the parties to the action in which the judgment was rendered, but is satisfied by a statement showing the parties in whose favor, and against whom, the judgment runs.—*Dento v. Benham.*..... 485
7. *Vacation—Res Judicata.* One who has attacked a judgment by motion to vacate, and has failed to prosecute

JUDGMENTS—CONTINUED.

an appeal from the denial of his motion, cannot subsequently maintain an action to cancel the judgment, since his remedy was by appeal, and the question of the validity of the judgment is *res judicata*.—*McCord v. McCord* 529

8. *Cessation of Lien—Revival—Rights of Intervening Purchasers.* Under Code Proc., § 460, which provides that the real estate of a judgment debtor shall be held and bound to satisfy any judgment for the period of five years from the date of its rendition, and that the lien of the judgment on such real estate shall continue only five years, commencing from the date on which the judgment was rendered, and under § 463, Id., which provides that a revived judgment shall be and continue a lien upon real estate of a judgment debtor for a period of five years from and after the date of the order of revival, in like manner with the original judgment, but that no judgment should be revived unless proceedings therefor should be commenced within six years after the date of its rendition, the act of revival does not make the lien continuous, where application therefor is not made until after the expiration of the five years; and, where the lien has ceased, prior to the order of revival, it cannot be revived so as to affect the rights of a purchaser who had acquired title subsequent to the original judgment, but such after acquired title gains priority over the judgment during the interval between the cessation and revival of the judgment lien.—*Brier v. Traders' National Bank of Spokane*..... 695

9. *Res Judicata—Matters Concluded.* An action seeking the foreclosure as a mortgage of a deed absolute on its face would not be barred on the ground of *res judicata* by the fact that, in a prior action between the same parties involving the same premises, the plaintiff herein being a subsequent grantee and defendant a prior judgment creditor, judgment had been rendered decreeing plaintiff's conveyance subject to the lien of the prior judgment, and authorizing the judgment creditor to sell on execution all of the interest of plaintiff's grantor in the premises, when the court in the prior action expressly found that the conveyance to the plaintiff in this action had been made subsequent to said judgment, but for a valuable consideration, and there was no find-

JUDGMENTS—CONTINUED.

ing or adjudication upon the question of the fraudulent character of the conveyance, though alleged and denied in the prior action, such issue not being material to the controversy therein.—*Id.*..... 695

SEE APPEAL, 30; CONSTITUTIONAL LAW, 2; EVIDENCE,
4.

JURY.

1. *Juror—Qualifications—Service on Jury Within Previous Year.* Bal. Code, § 4748, which makes service upon a jury within the previous year a ground for challenge, does not render one incompetent to serve as a juror, in the absence of a challenge.—*State v. Hall*..... 255
2. *Examination of Jurors—Impression of Guilt.* Where a juror states on his *voir dire* that he has no opinion as to the guilt or innocence of accused, but that he has some slight impression on the subject from having heard the case discussed by persons who did not claim to know the facts, and that such impression would readily yield to testimony, he is not disqualified on the ground of actual bias.—*State v. Royse*..... 440
3. *Same—Prejudice—Drunkenness.* In examining a juror as to whether or not he was prejudiced against the defenses of drunkenness and insanity, a question to the juror as to which side he would find on, if the evidence as to drunkenness should be equally balanced, was properly excluded, on the ground that it presented a question of law, upon which it was the court's duty to instruct the jury.—*Id.*..... 440
4. *Same—Hereditary Insanity.* Although a juror, when asked if he had any prejudice against the defense of drunkenness or insanity answered that to a certain extent he had, yet his exclusion on the ground of prejudice was properly denied, when his examination, taken as a whole, merely shows that he did not approve of drunkenness, and, in answer to questions by the court, he said that he could give that defense due effect and pass upon it the same as he would any other defense, and that it would not require any different evidence to prove it than would any other defense.—*Id.*..... 440

JURY—CONTINUED.

5. *Same*. Where one of the defenses in a criminal case was hereditary insanity, a juror was not qualified by reason of stating he did not believe in hereditary insanity, when his examination as a whole showed that he did not mean to take that position, but that the defense would have to be proven before he would believe it.—*Id.*..... 440
6. *Qualifications of Juror—Voir Dire—Right of Court to Put Leading Questions*. The fact that the court, for the purpose of passing upon the qualifications of a juror who has been challenged, asks him the leading question, "Would you not obey the instruction of the court as to the law in the case"? would not constitute error.—*State v. Boyce* 514
7. *Same—Competency—Bias*. A juror is not chargeable with bias or implied bias when he states on his examination that he would require no greater evidence to convict a man of murder in the first degree where the penalty is death than he would where the penalty is imprisonment in the penitentiary.—*Id.*..... 514
8. *Same—Impressions Acquired by Reading Newspaper*. In a prosecution for murder, when the fact of killing was not denied, but the defense was based on drunkenness and insanity, a juror was not shown to be disqualified from the fact that he had read a newspaper account of the killing, but did not know who was charged; that he had no opinion as to the guilt or innocence of the accused; that what he read was a mere matter of news and he did not know whether the newspaper account was true or not, but he believed from the account the person whose name was given in the paper was the person who killed deceased, and that it would take considerable evidence to change his mind.—*Id.*.... 514
9. *Same—Relationship Between Attorney and Juror*. The fact that the attorney for the prosecution trades with a juror, and that the latter has a high opinion of him as a man, and would go to him if he should become involved in litigation, but has never consulted him as an attorney, is not a disqualification of the juror, under Bal. Code, § 4984, which provides that a challenge for implied bias may be taken when it appears that the

JURY—CONTINUED.

juror and the attorney are standing in the relation of attorney and client.—*Id* 514

See CRIMINAL LAW, 5, 7, 8, 17.

LANDLORD AND TENANT.

Unlawful Detainer—When Cause of Action Arises. Under Bal. Code, § 5527, which provides that a tenant of real property is guilty of unlawful detainer, when he, having leased real property for an indefinite time, with monthly rent reserved, continues in possession thereof after the end of any such month, in cases where the landlord, more than twenty days prior to the end of such month, shall have served notice requiring him to quit the premises at the expiration of such month, an action of unlawful detainer will lie against a tenant from month to month, who continues in possession after the end of a month, when notice to quit had been given to him more than twenty days prior thereto.—*Yesler Estate v. Orth* 483

See ESTOPPEL; PLEADING, 5.

LARCENY. See CRIMINAL LAW, 6; FALSE PRETENSES; INDICTMENT AND INFORMATION, 1.

LAW OF THE CASE. See APPEAL, 21.

LIENS.

1. *Laborer's Lien—Enforcement—Joinder of Separate Claimants.* The joinder as parties plaintiff of persons seeking to foreclose liens for labor given by Laws 1897, p. 55, is proper, since the act provides for the enforcement of the liens in the same manner as mechanics' liens, and the statute (Bal. Code, § 5910) governing in such cases requires the joinder of all lien claimants as parties plaintiff or defendant in any action for the foreclosure of their liens.—*Fitch v. Appelgate*.. 25
2. *Same—Pleading—Sufficiency of Complaint—Reference to Exhibits.* A complaint for the foreclosure of a laborer's lien sufficiently sets forth facts constituting a cause of action, when, although not incorporating the terms and conditions of the lienor's contract in the body of the

LIENS—CONTINUED.

- complaint, it makes express reference to an exhibit attached to the complaint, in which is set forth a statement of such terms and conditions.—*Id.*..... 25
3. *Same—Attorney's Fees.* The allowance of an attorney's fee to a lien claimant upon a decree of foreclosure in his favor of a laborer's lien is proper, under the terms of the act providing for the enforcement of such liens in the same manner as mechanics' liens are enforced.—*Id.*..... 25
4. *Same—Notice of Lien—Sufficiency of Statement.* Under a statute giving a lien for labor performed "in the operation of any railway, canal or transportation company, or any water, mining or manufacturing company, sawmill, lumber or timber company," a notice of lien is sufficient, which states that the lien is for labor performed by the claimant at the instance and request of the employer, without particularizing what the claimant was employed to do or what he did do.—*Id.*..... 25
5. *Same—Statutes—Construction.* Laws 1897, p. 55, § 1, which provides that every person performing labor in the operation of any railway, canal, transportation, water, mining, manufacturing, sawmill, lumber or timber company shall have a prior lien on the franchise, earnings, and on all the real and personal property of said company, to the extent of the moneys due him for labor performed within six months next preceding the filing of his claim therefor, and no mortgage, deed of trust or conveyance shall defeat or take precedence over said lien, must be construed as merely intended to extend the period for which liens were allowed by a prior statute, and not as intended to give such liens priority over mortgages antecedently executed and recorded, in the absence of language clearly expressing the legislative intent to make such a radical provision.—*Id.*..... 25
6. *Employees' Liens—Claim for Labor of Others.* One who has a contract with an employer to do certain labor for him is not deprived of the right of lien given by Laws 1897, p. 55, to employees, from the fact that he hired help to assist in the performance of the labor, paying therefor at his own expense, when such hired labor in

LIENS—CONTINUED.

no wise changed the contract price or the relations between the employer and the lienor.—*Blumauer v. Clock*, 596

See CHATTEL MORTGAGES, 2, 3; CONSTITUTIONAL LAW, 1; JUDGMENTS, 8; LOGS AND LOGGING; MORTGAGES, 1, 4.

LIMITATIONS OF ACTIONS.

1. *Contracts by Residents of Another State—When Law of Former Governs.* Bal. Code, §4818, which provides that "when a cause of action has arisen in another state, territory, or country between non-residents of this state, and by the laws of the state, territory, or country where the action arose an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state," is inapplicable in the case of an action upon a promissory note by a resident of this state against a non-resident, although at the time of the execution of the note both plaintiff and defendant were non-residents, where plaintiff had taken up his residence within this state prior to the maturity of the note.—*Freundt v. Hahn*..... 8
2. *Accrual of Right of Action—Trespass Resulting in Continued Nuisance—Action for Damages.* Where a city in the improvement of a street constructed a bulkhead so negligently that it gradually gave way and encroached upon the premises of an adjoining lot owner to such an extent as to cause injury to a house situated thereon, the trespass constitutes an injury in the nature of a continuing nuisance, for which the party injured may recover accrued damages as often as he brings action therefor, and is not restricted to a single action to recover present and prospective damages; and hence the statute of limitations would not begin to run from the inception of the injury.—*Doran v. Seattle*..... 182
3. *Same—Fraud.* An action by a principal against an agent to recover a sum of money, with interest, which the agent had obtained in violation of his trust, had concealed the fact from his principal, refused to pay the money over on demand after discovery, and fraudulently converted it to his own use, is an action for relief on the ground of fraud within the meaning of the

LIMITATIONS OF ACTIONS—CONTINUED.

statute of limitations, so that an action would not be deemed as having accrued until the discovery by the aggrieved party of the facts constituting the fraud.—*Stearns v. Hochdrunn* 206

4. *Same—Discovery of Fraud—Sufficiency of Allegations to Avoid Statute of Limitations.* In an action for relief on the ground of fraud, it is not necessary, in order to avoid the statute of limitations, to allege in the complaint what acts of diligence plaintiff used to discover the fraud, the circumstances of its discovery, and why it was not discovered sooner, but it is sufficient, under the code, to plead merely the time at which the fraud was discovered.—*Id.*..... 206

5. *Suspension of Statute—Absence From State.* The running of the statute of limitations is suspended during such time as plaintiff is incapacitated from bringing his action by reason of the absence of the defendant from the state.—*Bignold v. Carr* 407

See APPEAL, 11; JUDGMENTS, 4; TROVER AND CONVERSION.

LIS PENDENS.

Unlawful Filing—Cancellation—Appealable Order. A *lis pendens* notice can properly be filed only when there is an action pending involving the land covered by the notice, and the filing of such notice by one of the parties to an action after it has been determined against him constitutes a cloud upon his adversary's title, which he has a right to have removed; hence an order of the court refusing to act upon his motion for its cancellation is an order affecting a substantial right and therefore appealable.—*Washington Dredging and Improvement Co. v. Kinnear*..... 405

See APPEAL, 22.

LOGS AND LOGGING.

Right of Lien—Waiver by Contract. Where a laborer employed in getting out saw logs entered in to an agreement whereby the employer was not to pay therefor until he had sold the logs to some mill and received the

LOGS AND LOGGING—CONTINUED.

proceeds of the sale, the laborer thereby waived his statutory right of lien by his contract to give his employer the absolute possession and power of disposal of the logs.—*Anderson v. Tingley*..... 537

See CORPORATIONS, 1; NAVIGABLE WATERS, 1-5.

MANDAMUS.

When Lies—Remedy by Appeal. The refusal of the superior court of one county to assume jurisdiction of a cause sent to it on a change of venue amounts to a final order of dismissal of the cause, which, being reviewable on appeal, precludes the supreme court from affording a remedy by writ of mandate to compel the lower court to entertain jurisdiction.—*State ex rel. Hubbard v. Superior Court*..... 438

See COURTS, 4.

MASTER AND SERVANT.

1. *Assumption of Risks.* Where an engineer in charge of the operation of the power house of a cable railway was killed by falling into the winder wheel while oiling the bearings, the facts that there were no guard rails around the wheel, that the butment on top of which he was compelled to walk in that work had a defective place in it rendering the surface uneven, and that the part of the house where the wheel was located was so insufficiently lighted that he was compelled to carry a candle while oiling, would not warrant a recovery by his family against the company, when the condition of the place was open and apparent, and the engineer had accepted the employment after full examination thereof, and had continued in the employment with knowledge of its unsafe character.—*French v. First Ave. Ry. Co.*..... 83
2. *Contract of Employment—Action for Breach—Damages.* Where an action for breach of a contract of employment was commenced during the term of employment contracted for, but not tried until after the expiration of such term of employment, the plaintiff is entitled to recover the same damages that he would have been en-

MASTER AND SERVANT—CONTINUED.

titled to had the action been commenced after the expiration of the term.—*Howay v. Going-Northrup Co.* 88

3. *Negligence—Whether Master's or Fellow Servant's—Instructions.* In an action for damages caused by the accidental discharge of a missed blast, in which it became a question for the jury as to whether the "boss" or "pusher" of a shift of workmen was a vice principal or a co-laborer with plaintiff's intestate, an instruction is not erroneous when it charges the jury that "persons working together in a common general employment may be fellow servants with regard to that general employment, and yet it might be under the circumstances that one of them could be a principal or master with regard to some particular part of that employment." As an illustration, "it might be that a shift working in a shaft would be fellow servants with regard to driving holes, blasting, mucking out, and yet it might be that the principal or master could have delegated to one of them the duty of seeing that all the blasts were discharged, and that there were no missed holes left when the succeeding shift should come on to work. So that as to that particular duty, if the principal should have assumed that duty, . . . then the principal could have delegated that particular duty to one of those who were engaged as a fellow servant in the other duties mentioned," since such instruction, taken together with others given on the same subject, should be construed as meaning that, if the jury found from the evidence that the pusher on each shift had been appointed by the defendant to look for hidden or unusual dangers not inherent in the work, and not to be anticipated in the labor in which deceased was employed, and to report the same to those working with and under him, then he was a vice principal, and his negligence would be imputed to the defendant.—*Shannon v. Consolidated Tiger & Poorman Mining Co.* 119
4. *Duty to Provide Safe Place to Work.* Where the men engaged in sinking a shaft in a mine were divided into three eight-hour shifts, and one man on each shift was known as a "pusher," doing the same work as his fellows, but having general direction of the work of his shift, and charged by the master with the duty of nati-

MASTER AND SERVANT—CONTINUED.

- tying the on-coming shift of any "missed holes" of undischarged dynamite, the failure of the pusher of an out-going shift to notify the on-coming shift of the existence of a missed hole, was the negligence of the master and not that of a fellow servant.—*Id.*..... 119
5. *Assumption of Risks.* The rule that an employee cannot recover for an injury received from a danger which is naturally and necessarily incident to work he is hired to do, and which is apparent to a reasonably prudent man, is not applicable to a case where a miner working on a tunnel of defendant in a narrow gulch, some eight hundred feet below another tunnel operated by defendant, is injured by a rock thrown from the upper tunnel, when it had not been customary to roll them down that particular gulch, and they could have been disposed of by throwing them down another gulch, where no work was going on.—*Uren v. Golden Tunnel Mining Co.*..... 261
6. *Fellow-Servants—Separate Employment Under Common Master.* The fact that two men were working for the same mining company would not make them fellow servants, when they were employed in separate tunnels under different superintendents, where no supervision of each other's work was possible and no opportunity afforded to use precautions against each other's negligence.—*Id.*..... 261
7. *Defective Machinery—Injury to Servant—Contributory Negligence.* In an action to recover for personal injuries, the refusal of the court to instruct the jury to find for the defendant, on the ground of plaintiff's contributory negligence, was proper when the evidence showed that plaintiff, while tending the separator of a threshing machine had the engine stopped so that he could remove and substitute concaves in the cylinder of the separator and straighten the teeth on such concaves; that while he had his hands in the cylinder engaged in such work the engine, owing to its leaky, defective and worn out condition, which was unknown to plaintiff, but of which defendant had knowledge, started automatically after it had been stopped by the engineer, communicating power to the separator and causing the cylinder to revolve, whereby plaintiff's hands were so

MASTER AND SERVANT—CONTINUED.

badly lacerated that amputation was necessary; that there would have been no opportunity for the cylinder to be set in motion, if plaintiff had removed the pin holding together the knuckles of two sections of a revolving tumbling rod, which was used to communicate power from the engine to the separator, but it was never customary to disconnect the separator from the source of power in that way; that the cylinder could have been held from turning by the insertion of an iron bar so as to catch its teeth, but such a method was not customary as it was necessary to slowly turn the cylinder when examining whether its teeth and those of the concaves interfered; and that the evidence as to defendant's having instructed plaintiff to use an iron bar for the purpose of holding the cylinder was conflicting.—*Hencke v. Babcock*..... 556

8. *Safe Place to Work—Assumption of Risks.* Where it was the custom in a store building having an elevator running from the basement to the second floor for any of the employees, without the ringing of a bell, to move the same at his own convenience by pulling a rope, an employee whose business it was to make use of such elevator must be held as having assumed the risk of his employment, and where, while engaged on one floor in loading the elevator, he backed into the open shaft and fell to the basement by reason of the elevator having been moved without warning, by another employee, he cannot recover for his injuries.—*Danuser v. M. Seller & Co.*..... 565

9. *Assumption of Risk—Apparent Dangers—Contributory Negligence.* An employee, injured by the giving way of a tie of a trestle and being precipitated into the water beneath, is chargeable with contributory negligence, where defendant was engaged in repairing the trestle by drawing new piles, laying new stringers and ties, where necessary, and laying new rails; and, in order to drive new piles, the ties had been cut out at intervals, a fact which was known to all the workmen, and was a danger that was apparent and against which the foreman had frequently warned the workmen; and the injury to plaintiff was the result of his having stepped upon one of these shortened ties, while engaged in the work of

MASTER AND SERVANT—CONTINUED.

- pulling and gathering the spikes which held the rails to the ties.—*Robare v. Seattle Traction Co.*..... 577

MINES AND MINERALS.

1. *Location of Claims—Making Boundaries—Reasonable Time.* Under U. S. Rev. St. §§ 2320, 2324, which provide that "no location for mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," and that "the location must be distinctly marked on the ground so that its boundaries may be readily traced," the locator of a mining claim is entitled to a reasonable time in which to mark the boundaries of his claim after its discovery.—*Union Mining & Milling Co. v. Leitch*..... 585
2. *Same.* Where the locators of a mining claim posted notices showing the direction and extent of their claim, but did not mark the boundaries on the ground until eight days thereafter, during which interval conflicting claims were filed by other locators who were aware of the prior location, the failure to mark the boundaries of the claim on the ground for eight days after discovery was not an unreasonable time, when the locators were compelled by lack of provisions to go to the nearest station where a supply could be procured, and did so, in the belief that they had a reasonable time to complete their location of their claim, one corner of which was almost inaccessible, owing to the roughness of the country.—*Id.*..... 585

See EVIDENCE, 5.

MORTGAGES.

1. *Merger.* There is no merger of a mortgage as against subsequent incumbrances, when the mortgagor conveys the land to the mortgagee, where it would be inequitable, or where there is an express agreement of the parties that the lien shall remain intact.—*Fitch v. Appelgate*.. 25
2. *Constructive Notice—Record Index.* A mortgagee of the "Scandinavian Free Church" is not chargeable with notice of a prior mortgage made by the same corporation, when it was executed under the name of "Scandinavian Congregational Church," and indexed under

MORTGAGES—CONTINUED.

- that name in the mortgage records of the county.—*Congregational Church Bldg. Society v. Scandinavian Free Church* 433
3. *Same—Existing Equities—Notice of Assignee.* A *bona fide* assignee of a mortgage for value, although assigned to him after its maturity, is not chargeable with the knowledge of his assignor as to the existence of a prior mortgage, since the rule that the assignee of a mortgage takes it subject to existing equities applies to such equities only as exist between the mortgagor and mortgagee and not to those existing between the mortgagee and third persons.—*Id.*..... 433
4. *Redemption by Mortgagor's Grantee—Effect.* A redemption from foreclosure sale by a grantee of the judgment debtor operates the same as if made by the judgment debtor himself, to extinguish the foreclosure proceedings, and the estate then stands as if no foreclosure sale had ever been made, and thereby revives the lien of a subsequent mortgage which would have been barred if no redemption had been made.—*De Roberts v. Stiles* 611

See CONSTITUTIONAL LAW, 5; SUBROGATION.

MUNICIPAL CORPORATIONS.

1. *Use of Streets by Telephone Lines—Power of City to Refuse—Construction of Statute.* There being no restriction on the legislative control of streets and highways contained in art. 12, § 19, of the constitution, which declares the right of individuals and corporations to maintain lines of telegraph and telephone within the state, the provision in Bal. Code, § 4369, the statute passed pursuant to such constitutional declaration, "that where the right-of-way, as herein contemplated, is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone line can be erected thereon," is valid, and amounts to an authorization to the council to refuse, as well as consent, to such use of the streets, and is not intended as an authorization of power merely to prescribe reasonable and proper regulations for the construction and opera-

MUNICIPAL CORPORATIONS—CONTINUED.

tion of such lines, inasmuch as the power of regulation and control is amply conferred by Bal. Code, § 739, subd. 7.—*State ex rel. Telegraph Co. v. Spokane*..... 53

2. *Defective Street—Absence of Railing—Negligence.* Where a city maintains a street, elevated from three and one-half to six feet above the adjacent land, without a guard rail to protect teams from shying off the roadway in case of fright, it is liable for negligence when a gentle horse, driven with ordinary care by an experienced driver, becomes frightened at the sight and noise of escaping steam blown off at that point of the street through pipes passing thereunder from an electric power house operated by the city, and backs the buggy to which it is harnessed off the roadway, causing serious injuries to the driver.—*Taylor v. Ballard*..... 191
3. *Same—Instructions—Reasonable and Ordinary Care.* An instruction which charges a jury that the law imposes on municipalities the duty of ordinary care in maintaining their streets in safe condition for ordinary travel is not erroneous on the ground that the law merely requires the exercise of reasonable care in such cases, since there is no distinction between ordinary care and reasonable care.—*Id.* 191
4. *Contracts—Whether Payable out of Indebtedness or Current Expense Fund—Construction of Statute.* Under Laws 1897, p. 222, requiring cities of less than 20,000 inhabitants to maintain a "current expense fund," corresponding to what had theretofore been known as the "general fund," and an "indebtedness fund" against which should be chargeable "all outstanding warrants, certificates and all other obligations and indebtedness of the city, for the payment of which no provision is made by law," the indebtedness described as "all other obligations and indebtedness" must be construed as limited to the same class as the particular words which precede, and hence where plaintiff had a claim creating a general liability of the city, but the amount of which was not finally fixed and ascertained at the date of the creation by law of the indebtedness fund, plaintiff could compel by writ of mandate the issuance to it of warrants upon the current expense fund in payment of the indebtedness due it.—*Townsend Gas & Electric Light Co. v. Hill*..... 469

MUNICIPAL CORPORATIONS—CONTINUED.

5. *Street Improvements — Reassessment — Objections—Eas-
toppel*—Where a city council has regularly assessed abut-
ting property for street improvements, and has given no-
tice to property owners to file objections to such assess-
ment, within a certain time, as required by statute, an
owner who fails to so object cannot afterwards dispute
the validity of the assessment in an action to remove the
cloud on his title created by a sale of the property upon
foreclosure of the assessment lien.—*McNamee v. Ta-
coma* 591
6. *Same—Constitutionality of Statute*—Laws 1893, p. 226,
providing for the reassessment of property "with refer-
ence to the benefits received," where the original assess-
ment for street improvement has been declared invalid,
complied with the doctrine that assessments for public
improvements must be tested by the benefits conferred,
and hence is not unconstitutional on the ground of au-
thorizing the taking, under the guise of taxation, of pri-
vate property for public use without compensation.—
Id. 591

See LIMITATION OF ACTIONS, 2; WATERS AND WATER-
COURSES, 2.

NAVIGABLE WATERS.

1. *Non-navigable Streams—When Public Highways—Float-
ability for Logs*.—A stream eighteen miles long, with an
average width of one hundred feet and depth of three
feet, which can, during annually recurring freshets, be
used profitably for the floating of logs to market, must
be held to be a public highway for the purpose of float-
ing logs and timber products, within the contemplation
of Bal. Code, §§ 4378-4386, which provide that, for the
purpose of booming and floating logs and timber pro-
ducts, all navigable waters in the state shall be deemed
public highways.—*Watkins v. Dorris*..... 636
2. *Same—Persons Entitled to Use*.—The statutes of this
state which declare non-navigable streams upon which
logs can be made floatable public highways and authoriz-
ing their use as such by corporations organized for boom-
ing and floating logs, must be held as conferring the
same rights upon individuals.—*Id.*..... 636

NAVIGABLE WATERS—CONTINUED.

3. *Same—Ownership of Bed of Streams.*—Art 17, § 1, of the constitution, which reserves title to the state in the beds of all navigable streams below the line of ordinary high water mark, has reference only to such streams as are navigable for general commercial purposes, and not to those which are public highways merely for the floating of logs and timber products.—*Id.*..... 636
4. *Same—Rights of Riparian Owner.* Although a non-navigable stream upon which logs are floatable may be a public highway so far as the floating of logs is concerned, persons or corporations using it for that purpose have no right to interfere with the bed of the stream, or with its banks, for the purpose of removing obstructions, without the riparian owner's consent, or the exercise of eminent domain, where title to the bed of the stream is in such riparian owner.—*Id.*..... 636
5. *Same—Damages as Result of Log Jam.* A riparian owner upon the banks of a stream which is navigable only for logs in time of freshets, is entitled to damages where his lands become overflowed by reason of the formation of a jam in the stream due to the negligence of parties floating logs therein.—*Id.*..... 636

See CORPORATIONS, 1; WATERS AND WATERCOURSES.

NEGLIGENCE—See DAMAGES, 1, 2; MASTER AND SERVANT, 1, 3-9; PLEADINGS, 4, 6; STREET RAILROADS, 1-3.

NEGOTIABLE INSTRUMENTS—See BILLS AND NOTES.

NEW TRIAL.

Newly Discovered Evidence—Discretion of Court. The denial of a new trial to defendant on the ground of newly discovered evidence does not constitute an abuse of discretion, when the newly discovered evidence consisted of statements made by plaintiff's husband differing from her own testimony, given in a deposition by him, which was taken on notice, and published during the trial without the knowledge of defendant, when the court gives full effect to any inferences deducible from the deposition in overruling the motion for new trial on condition

NEW TRIAL—CONTINUED.

that plaintiffs remit a portion of their verdict.—*Tyler v. North American Trading & Transportation Co.*..... 252

See APPEAL, 10, 19, 42; CARRIERS, 1; CRIMINAL LAW, 2, 4, 5.

OBSCENITY.

1. *Circulating Indecent Picture—Sufficiency of Information.* An information which alleges that defendant "knowingly" distributed a certain indecent picture sufficiently charges knowledge on his part of the indecency of the picture.—*State v. Ulsemer*..... 657
2. *Same—Instructions.* Where the information charged defendant with knowledge of the indecency of a picture circulated by him, an instruction by the court that "The sole questions for the jury to determine are, Did the defendant knowingly distribute the picture as charged in the information? and was this picture indecent?" are sufficiently specific as to the law of the case.—*Id.*.... 657
3. *Same—Evidence of Usage.* In a prosecution for distributing an indecent picture, where the statute makes the jury the sole judges as to whether or not the matter circulated is obscene and indecent, testimony as to the use of similar pictures in commerce and trade is incompetent.—*Id.*..... 657

See CRIMINAL LAW, 18.

OFFICERS.

1. *Holding Over Beyond Constitutional Limitation.* The fact that the incumbent has held office for two terms, and that the constitution (art. 11, § 7) declares that "no county officer shall be eligible to hold his office more than two terms in succession," is immaterial, since his term does not end until his successor is elected and qualified.—*State ex rel. Meredith v. Tallman*..... 426
2. *Same—Failure to Give New Bond—Effect.* The fact that an incumbent of a county office failed to give a new bond after the expiration of the two years would not disqualify him for the office, since Bal. Code, § 1518, makes

OFFICERS—CONTINUED.

the old bond sufficient, during the time such officer shall continue to hold such office.—*Id.*..... 426

See APPEAL, 26; COUNTIES, 2; REVIEW, WRIT OF;
SCHOOLS AND SCHOOL DISTRICTS.

PARTIES.

Non-Joinder of Defendants—Timeliness of Objection.

Where there is a defect of parties defendant, objection on that ground should be raised before trial in order to be available on appeal.—*Bigbold v. Carr.*..... 407

See HUSBAND AND WIFE, 3; INFANTS, 1, 3; JUDGMENTS, 6; LIENS, 1.

PARTNERSHIP. See FALSE PRETENSES, 1.

PLEADING.

1. *Sufficiency of Complaint—Pleading Written Instruments—Legal Effect.* In an action to enjoin stockholders from interference with plaintiff's exercise of the office of trustee and manager of a private corporation, it is sufficient, when necessary to plead the articles of incorporation and by-laws of the corporation, to state them in substance and according to their legal effect, without setting them out in *haec verba*.—*Seal v. Cameron.*..... 62
2. *Ambiguity—Construction.* Where the language of an affidavit is capable of two constructions, that which is plainly consonant with common sense and the actual facts must be adopted.—*Goore v. Goore.*..... 139
3. *Action on Note—Allegation of Conclusions—Waiver of Demand and Notice.* An allegation in a complaint upon a promissory note against an indorser thereof that at the time of indorsement "he waived demand and notice," is not such a conclusion of law as to render the complaint demurrable for want of facts, since such allegation is one of the facts, although the facts stated may embody a conclusion as well.—*Bay View Brewing Co. v. Grubb* 163
4. *Negligence—Evidence Admissible Under General Allegation.* Where the complaint in an action to recover for personal injuries contains a general allegation of negligence, any fact tending to contribute approximately to

PLEADING—CONTINUED.

the injury is admissible in evidence thereunder.—*Uren v. Golden Tunnel Mining Co.*..... 261

5. *Action for Possession—Amended Answer—Departure.* In an action by the owners of premises to recover restitution and damages for detention, in which defendant pleaded a surrender and cancellation of an outstanding unexpired lease held by another, and that thereupon plaintiffs entered into an express agreement with him, whereby he was to have possession of the premises described for a period of one year, the filing of an amended answer by defendant, after issue joined, setting up certain facts by way of an equitable estoppel does not amount to an abandonment of the original defense and such a departure as to take plaintiffs by surprise, when the second answer is, in effect, an extended explanation of the particular manner in which the defendant came into possession of the premises, and the reasons for entering into the contract.—*Brown v. Baruch*..... 572
6. *Bill of Particulars—Action for Personal Injuries—Damages.* In an action by husband and wife to recover damages for injuries received by the wife through defendant's negligence, an instruction which submits to the jury the question of compensation for the suffering endured by the wife is prejudicial error, where, under a bill of particulars filed by plaintiffs, the items of damages claimed under the complaint are restricted to medical attendance, medicines and supplies, and time in attending to, nursing, and caring for the wife.—*Howells v. North American T. & T. Co.*..... 689
7. *Same—Statement Voluntarily Furnished to Adverse Party—Effect.* The fact that a bill of particulars furnished upon the oral request of counsel for the adverse party, was not filed before trial, nor referred to at the time of trial is immaterial, since parties voluntarily furnishing a statement of items under their claim for damages are bound by it as fully as though furnished under the order of the court.—*Id.*..... 689

See APPEAL, 11, 20; BILLS AND NOTES; DAMAGES, 4; DISMISSAL AND NON-SUIT, 1, 2; DIVORCE, 3; INSURANCE; JUDGMENTS, 1, 5; LIENS, 2; LIMITATION OF ACTIONS, 4; PRINCIPAL AND AGENT, 1; QUIETING TITLE, 1; RECEIVERS, 1; REPLEVIN, 1; TAXATION, 5, 7.

PLEDGES.

Foreclosure of Pledge—Trial of Paramount Title. In an action to foreclose a pledge of shares of stock, the fact that defendant's answer sets up a claim of paramount title to the shares of stock in controversy, affords plaintiff no right to demand a dismissal of his action, on the ground of being privileged to elect not to try title in such action.

(*California Safe Deposit & Trust Co. v. Cheney Electric Light, etc., Co.*, 12 Wash, 138, limited to mortgage foreclosure suits).—*Washington National Building, Loan & Investment Association* 321

See TROVER AND CONVERSION.

PRINCIPAL AND AGENT.

1. *Undisclosed Principal—Pleading.* In an action against an undisclosed principal the complaint is not demurrable on the ground that it nowhere alleges that the agent was acting for an undiscovered principal, when in one paragraph it sets up the contract with the agent upon which the action is based, and in a subsequent paragraph alleges that the contract was executed by such agent for and on behalf of the defendant; that the agreements therein contained to be performed by said agent were in fact to be done by the defendant; that the defendant had repeatedly recognized the contract as binding upon it, and had repeatedly promised to carry out the terms thereof.—*Belt v. Washington Water Power Co.* 387
2. *Same—Written Agreement by Agent—Parol Evidence.* Oral testimony is admissible for the purpose of showing that an undisclosed principal was actually a party to a written agreement.—*Id.*..... 387
3. *Same—Action Against Principal and Agent Jointly—Misjoinder.* Conceding that a joint action against an alleged agent and his undisclosed principal may be a misjoinder of causes of action, yet where the alleged agent was dismissed from the case in response to a demurrer, and the action proceeded against the alleged principal alone, with the acquiescence of plaintiff, the error, if any, was cured by the action of the court and parties.—*Id.*..... 387

See BROKERS; FALSE PRETENSES, 2; LIMITATION OF ACTIONS, 3.

PRINCIPAL AND SURETY. See ASSIGNMENTS, 1, 2; REPLEVIN, 2.

PROCESS. See DIVORCE, 1, 2.

PROHIBITION, WRIT OF. See COURTS, 3.

PROPERTY. See CHATTEL MORTGAGES, 1.

PUBLIC LANDS. See COURTS, 1; INDIANS; TIDE LANDS.

QUIETING TITLE.

1. *Pleading—Amendment of Complaint on Trial.* In an action to quiet title in which the defendants had set up the defense that the taxes on the land in controversy had been paid by them, it was not an abuse of discretion for the court to permit the plaintiff on the trial to amend her complaint by interlineation so as to show payment of taxes for certain years by her grantor.—*Newman v. Buzard* 225
2. *Right of Occupant to Maintain Action.* Any person in possession of land, although not the owner of the fee, may maintain an action for the purpose of quieting his title thereto, so as to avoid any uncertainty in his holding, under Bal. Code, § 5521, which provides that any person in possession of real property may maintain a civil action against any person claiming an interest in said real property, or any right thereto, adverse to him, for the purpose of determining such claim, estate or interest.—*Bird v. Winyer*..... 269

See LIS PENDENS.

RAILROADS. See ADVERSE POSSESSION.

RECEIVERS.

1. *Plurality of Funds—Payment of Claims—Pleading—Sufficiency of Petition.* Where a receiver appointed to take charge of the partnership, community, and individual estate of an insolvent, and authorized to first pay all the firm and community liabilities out of the partnership and community property before applying any balance thereof to the satisfaction of the insolvent's individual debts, is sought to be restrained by a firm creditor from paying a creditor of the separate estate out

RECEIVERS—CONTINUED.

of the funds arising from the community estate, a cross petition of the individual creditor fails to state facts sufficient when it alleges that \$30,000 had been realized from the insolvent's separate estate and applied in discharging liens against the community realty and in paying the expenses of the receivership, nearly all of which expenses had been connected with the administration of the partnership estate, when there is no allegation that the money was not properly so applied under the decree, nor any allegation of unauthorized diversion of funds from one class of claims to the other, nor any allegation that there is any money in the receiver's hands, derived from the individual estate, sufficient to pay any part of the cross petitioner's claim.—*Cannon v. Snipes*.. 166

2. *Same—All Funds Available for Receivership Expenses.* Where but one receivership has been created to take charge of the firm, community, and individual estate of an insolvent, funds derived from any of such estates are available for payment of the expenses of the receivership, although the decree provided for payment of each class of creditors primarily from the corresponding class of funds.—*Id.*..... 166
3. *Same—Rents from Community Realty—Liability for Debts of One Spouse.* Where a decree of the court appointing a receiver directs him to take charge of the community estate of an insolvent and apply the proceeds thereof to the satisfaction of community debts, such a specific lien is created against the property as to render the rents collected therefrom by the receiver community funds.—*Id.*..... 166
4. *Superseding Prior Orders by Final Decree.* Where the court in an insolvency proceeding has rendered a final decree fixing the claims of all the various classes of creditors, marshalling and listing all the assets in the receiver's hands, and directing a sale thereof and the payment of the various claims according to their character out of the various kinds of property, consisting of partnership, community, and individual assets of the insolvent, such final decree supersedes a prior one in the cause, wherein the receiver was ordered to pay peti-

RECEIVERS—CONTINUED.

tioner's claim "out of any money available in his hands so to do."—*Id.*..... 166

See BANKS AND BANKING, 2, 3; CORPORATIONS, 3.

REPLEVIN.

1. *Burden of Proof.* In an action of replevin to recover possession of goods sold under a contract in the nature of a conditional sale, the burden of proof is upon plaintiff to establish ownership and right of possession in himself, even although defendant, by an affirmative defense, sets up a plea of payment in full, since such plea in an action of replevin amounts to no more than an allegation of property in defendant, and adds nothing to the answer of general denial.—*Johnston v. McCart.*.... 19

2. *Claim and Delivery—Bond—Judgment Against Surety.* Where judgment is entered in favor of defendant in an action of claim and delivery, it is error to include therein judgment against a surety upon the bond given by plaintiff for the purpose of obtaining possession of the goods at the commencement of the action.—*Bancroft-Whitney Co. v. Gowan* 66

3. *Right of Action—Chattel Mortgage—Default—Action for Possession of Goods.* Where a chattel mortgage gives the mortgagee the right, in case of default in payment, to take possession of the goods and retain them, such right of possession may be enforced by an action of claim and delivery.—*Id.*..... 66

REVIEW, WRIT OF.

When Lies—Inadequate Remedy by Appeal. Where a remedy by appeal would be of no avail to one ousted from office by a judgment of the superior court, by reason of the fact that his right to the office would terminate before a hearing could be had on appeal, the supreme court has jurisdiction by writ of review to examine and correct the action of the lower court.—*State ex rel. Meredith v. Tallman* 426

ROBBERY.

Sufficiency of Information—Ownership of Property Taken.
An information charging the crime of robbery is in-

ROBBERY—CONTINUED.

sufficient when it fails to allege ownership of the property taken in some one, other than the defendant.—

State v. Dengel 49

See INDICTMENT AND INFORMATION, 1.

SCHOOLS AND SCHOOL DISTRICTS.

County School Superintendent—Term of Office—Extension of Term. Where a county superintendent of schools was elected to office under a statute which provided that his "term of office shall begin on the second Monday in January next succeeding his election and continue for two years and until his successor is elected and qualified" and during his term the law was so changed as to make the term "begin on the first Monday in August next succeeding his election," such county superintendent is entitled to hold the office until the qualification of his successor for the term beginning in August, although thereby his term is made greater than two years, since under the provisions of the statute whereby he holds office he was to continue therein for more than two years, in case his successor was not elected and qualified, and consequently the statute deferring the beginning of his successor's term from January to August would not be in violation of art. 11, § 8, of the constitution, which prohibits the extension of the term of any county officer beyond the period for which he was elected.—*State ex rel. Meredith v. Tallman*..... 426

SHIPPING.

Shipping—Bottomry Bond—Collateral Security—Liability of Owner on Loss of Vessel. Where the master of a steamship gave a bottomry bond upon a vessel, her cargo and freight, to cover advances made to enable her to pursue her voyage, at the same time drawing a draft upon the owners for the amount of the bottomry bond; and on the day following the execution of the bottomry bond and draft another bond was executed by an attorney in fact of the owners to secure said draft, in which it is recited that the consideration therefor is the acceptance by the obligee of a bottomry bond to secure the sum advanced; the three instruments must all be considered as part of one transaction, governed by

SHIPPING—CONTINUED.

the rule applicable to bottomry bonds, whereby the owners' liability is dependent on safe arrival of the vessel in port; and hence, where the vessel was lost, the bond given by the owners to secure the draft included in the bottomry obligation did not create any personal liability against them.—*Theo. H. Davies & Co. v. Soelberg* 308

STATUTES.

1. *Arson—Validity of Statute—Plural Subjects Embraced in One Act.* Laws 1895, p. 173, defining the crimes of arson and attempted arson, and providing a punishment for each, does not violate art. 2, § 19, of the constitution, which provides that "No bill shall embrace more than one subject," since arson and attempted arson are sufficiently connected to permit legislation with reference thereto to be embodied in one act.—*State v. Hall*..... 255
2. *Appropriation Bills—Time of Taking Effect.* The act of March 2, 1901 (Laws 1901, p. 54), entitled "an act providing for the purchase and completing and furnishing of a state capitol building, and providing for the payment of interest and making an appropriation," took effect immediately upon its passage and approval, since it must be construed as an appropriation bill, falling within the exception contained in art. 2, § 31, of the state constitution, which declares that "no law, except appropriation bills, shall take effect until ninety days after the adjournment of the session," unless otherwise directed by the legislature in case of an emergency.—*State ex rel. Stratton v. Rogers*..... 417

See LIENS, 5; MUNICIPAL CORPORATIONS, 1, 4; TIDE LANDS.

STREET RAILROADS.

1. *Action for Negligence—Stopping Car for Passenger to Alight at Dangerous Place.* A street railway company is guilty of negligence, when the conductor on one of the cars, having been informed by a passenger that he desires to get off at a certain point, calls out the destination and rings the bell for the motorman to stop, but the

STREET RAILROADS—CONTINUED.

car is allowed to run some fifty feet beyond the landing, stopping on a trestle where it is dangerous to alight, and the passenger is put off at that point and informed that his destination is "Right across there."—*Henry v. Grant Street Electric Ry. Co.*..... 246

2. *Same—Contributory Negligence.* A passenger upon a street car is not guilty of contributory negligence in alighting therefrom in a dangerous place, though he was familiar with the surroundings, where the night was dark, and he had indicated to the conductor to stop at the proper landing place on a trestle upon which the track was laid above the tide flats, but the car had been allowed to run fifty feet beyond the landing, and the conductor, after calling out the name of the destination desired by the passenger, put him off in the unusual and dangerous place at which the car had stopped, and the passenger, in reliance upon the conductor's having put him off at the regular stopping place, did not take the precaution to observe the position he was in, and, on taking a step away from the car, was precipitated some twelve or thirteen feet from the trestle upon the tide flats below.—*Id.* 246

3. *Instructions—Relevancy to Issues.* In an action to recover for personal injuries received by reason of alighting from a street car at a dangerous place, after having been carried beyond the proper landing place, without notification from the defendant's employees, it is not error to refuse a requested instruction by defendant as to the degree of care required of a carrier of passengers in maintaining its platforms and landings in a safe condition.—*Id.* 246

SUBROGATION.

To Rights of Mortgagee. The grantee of a person who has assumed and agreed to pay a mortgage cannot, on making payment, be subrogated to the rights of the mortgagee.—*DeRoberts v. Stiles* 611

TAXATION,

1. *Corporations—Right to Tax Franchise—Not Affected by License Fees.* The annual license fee of ten dollars imposed by statute upon corporations doing business in this

TAXATION—CONTINUED.

- state, is merely an excise upon the right of the corporation to exist and does not supersede the right to tax the franchise of the corporation.—*Chehalis Boom Co. v. Chehalis County* 135
2. *Same—Assessment—Objections to Valuation—Time and Place to Urge.* A corporation cannot complain of the arbitrary valuation placed upon its franchise by the assessor, where it has made no application to the board of equalization for a reduction of the valuation placed upon its personal property.—*Id.* 135
3. *Enjoining Void Tax—Jurisdiction.* The superior court has jurisdiction of an action instituted to enjoin the collection of an illegal and void tax, and the property owner is not confined to proceedings before the board of equalization or appeal therefrom.—*Lewiston Water & Power Co. v. Asotin County* 371
4. *Same—Tender of Due Tax.* Where an action is brought to enjoin the collection of a tax alleged to be void, no tender is necessary, under the terms of Bal. Code, § 5678, which requires the payment or tender of what is justly due as a prerequisite to suit.—*Id.* 371
5. *Same.* Under the requirements of Bal. Code, § 5678, it is sufficient to plead payment and tender of the taxes justly admitted to be due, without tendering such portion of the tax as is claimed to be illegal.—*Id.* 371
6. *Same—Corporate Stock—Double Taxation.* The separate listing and taxation of the capital stock of a corporation and its real and personal property, where the capital stock is all invested in the real and personal property, is double taxation, and therefore illegal, in the absence of specific legislation authorizing it.—*Id.*.. 371
7. *Same—Pleading.* In an action to enjoin the collection of taxes illegally assessed, an allegation in the complaint that the real and personal property of a corporation had been assessed; that at the same time its capital stock was listed and assessed; and that all the proceeds of the capital stock were invested in the real and personal property assessed, is a sufficient averment, as against a general demurrer, that all the capital stock is invested in said real and personal property.—*Id.* 371

TAXATION—CONTINUED.

8. *Illegal Assessment—Remedy by Injunction.* The courts of this state have power by injunction to restrain the enforcement of an illegal tax upon real property and to remove the apparent lien created by the invalid levy.—*North Western Lumber Co. v. Chehalis*..... 626
9. *Place of Taxation—Personal Property of Corporation.* Section 9 of the act of March 15, 1893 (Laws 1893, p. 327), which provides that personal property pertaining to the business of a manufacturer shall be listed in the town or place where his business is carried on, must be construed in connection with other sections of the same act which require corporeal personal property to be assessed in the school district and road district in which it is actually situated at the time the assessment is made, and hence a milling corporation which has its office and part of its personal property within the corporate boundaries of a town cannot be assessed for municipal taxation upon its corporeal personal property which is situated just beyond the corporate limits of the municipality.—*Id.* 626

See CHATTEL MORTGAGES, 2.

TELEGRAPHS AND TELEPHONES. See CONSTITUTIONAL LAW, 3, 4; MUNICIPAL CORPORATIONS, 1.

TIDE LANDS.

First and Second Class—Construction of Statute. Under Laws 1897, p. 248, § 39, which provides that tide lands of the first class shall comprise tide lands "within or in front of the limits of any incorporated city or town, or within two miles thereof on either side," and all tide lands not included in the above class shall be known as second class, the term "in front of the limits of any incorporated city" must be construed as referring to only such lands as lie adjoining and in front of the limits of a city; and the term "within two miles thereof on either side" should be construed as referring to such tide lands as are located, by measurement along the general direction of the city shore line, within a distance of two miles from either of its two boundary lines which extend inland from such shore line.—*State ex rel. Lehman v. Bridges*..... 363

TRESPASS. See LIMITATION OF ACTIONS, 2.

TRIAL.

1. *Refusal of Requested Instructions—Harmless Error.*
The refusal of the court to give pertinent requested instructions is not error, when the court's instructions in its own language are substantially the same as those requested by appellant.—*Howay v. Going-Northrup Co.* 88
2. *Verdict—Inconsistency Between General and Special.*
Where a complaint, in addition to containing sufficient facts to state a cause of action, includes in its allegations immaterial statements, which amount to nothing more than the pleader's conclusion from the facts stated, a special verdict finding against him on such immaterial allegations cannot be held as inconsistent with a general verdict in his favor.—*Mercier v. Travelers' Ins. Co.* 147
3. *Argument of Counsel.* In an action to recover damages for personal injuries, a statement by counsel that plaintiff "tells you the truth when he tells you he will not be able to get married, and I submit the proof shows that he is incapacitated from contracting the marriage relation," would not be prejudicial error, on the ground of improper argument of counsel, when the record shows that the statement was warranted by the testimony of plaintiff.—*Taylor v. Ballard.*..... 191
4. *Objection to Admission of Evidence—Timeliness.* The refusal of the court to strike the testimony of a witness, on the ground that it related to transactions with a deceased person and that the witness was disqualified under Bal. Code, § 5991, as being a party in interest, was not error, where the testimony was admitted without objection, the witness subjected to a rigid cross-examination on the matters involved, but no examination made as to his alleged interest and no opportunity afforded him for explanation, and the motion to strike his testimony was not interposed until some days following its admission.—*Newman v. Buzard.*..... 225
5. *Instructions—Construction as a Whole—Harmless Error.*
Although a portion of an instruction, if standing alone, might have a tendency to confuse the jury, yet it will

TRIAL—CONTINUED.

not constitute prejudicial error, if, when taken in connection with the instruction as a whole, the jury could not be misled as to the presentation by the court of the law of the case.—*Henry v. Grant Street Electric Ry. Co.* . . . 246

6. *Submitted Questions—Failure of Jury to Answer—Right of Court to Determine.* The failure of a jury in an equity case to answer a question submitted by the court for their investigation as to the facts will not preclude the court from proceeding, upon the testimony adduced, to make findings of fact and conclusions of law in reference to the subject covered by such questions.—*Land Mortgage Bank of Northwestern America v. Nicholson.* . . . 258
7. *Findings by Court—Conclusiveness.* Where a jury is waived in an action at law and the case is tried by the court, the findings of the court are equivalent to a verdict, and will not be interfered with, when there is evidence upon which to base the findings.—*Second National Bank v. Hatch.* 421
8. *Instructions—Withdrawal of Request for Written Instructions—Effect.* Where appellants did not ask for written instructions, nor join respondent in his request therefor, the appellants cannot urge the objection on appeal that they had no knowledge of respondent's having withdrawn his request for written instructions, and that they relied on the instructions being given in that form, and not orally.—*Hencke v. Babcock.* 556
9. *Misconduct of Judge—Comment on Facts.* A remark by the judge that every doctor examined seemed to locate the external capsular ligament in a different place, and he would like to see in a surgical work, just where that ligament is, and would like an exact description of it, does not fall within the prohibition of art. 4, § 16, of the constitution against commenting on the facts, since the remark amounts to nothing more than an expression of the judge's inability to understand, from the description given by the medical witnesses, the exact location of that ligament, made with the object of calling the attention of counsel to the difficulty felt by him, so as to have the matter made clearer to judge and jury.—*Miller v. Dumon.* 648

TRIAL—CONTINUED.

10. *Instructions—Interpretation as a Whole—Harmless Error.* Although an instruction, standing alone, may have had a tendency to mislead the jury, yet it would not constitute prejudicial error, when it is apparent, from the instructions as a whole, and in the light of their verdict, that the jury could not have been misled.—*Id.* 648
11. *Same—Refusal of Requested Instruction.* The refusal to give a requested instruction upon defendant's theory of the case is not prejudicial error, when that point is sufficiently covered by the instructions given by the court.—*Id.* 648
12. *Failure to Object to Testimony—Erroneous Instructions—Estoppel to Urge Error.* In an action by husband and wife to recover for injuries to the wife, in which a bill of particulars restricted the damages to medical attendance, medicines and the husband's claim for services in attending upon his wife, although the complaint had alleged the pain and suffering of the wife, the fact that evidence of the wife's pain and suffering was admitted without objection by defendant would not estop it from urging objection to the error of the court in submitting to the jury the question of compensation for her pain and suffering, since such testimony was competent in support of the husband's claim for money expended and services made necessary by such suffering.—*Howells v. North American T. & T. Co.*.... 689

See APPEAL, 14, 31, 43; CARRIERS, 2; CRIMINAL LAW, 8, 12, 15, 19; HOMICIDE, 2, 7; MUNICIPAL CORPORATIONS, 3; OBSCENITY, 2; STREET RAILROADS, 3.

TROVER AND CONVERSION.

Action for Conversion—Limitation. Where one rightfully in the possession of another's goods wrongfully pledged them to a third party, who afterwards sold them in satisfaction of the pledge, the limitation upon the owner's right of action against the pledgee for conversion began to run from the time of the pledgee's acquisition of the goods and not from the time of sale.—*Kinkead v. Holmes & Bull Furniture Co.*..... 216

See BROKERS.

VAGRANCY. See INFANTS, 2.

VENUE.

Issue Affecting Land in Other County. In an action to compel the issuance to plaintiff of stock in a mining company, wherein a complaint in intervention claiming an interest in a portion of the same stock is filed, the intervenor cannot ask for the rescission of a contract of conveyance of land in another county because of the fraud of one of the defendants in procuring a transfer of such stock in consideration of said conveyance.—*Boardman v. Hager* 487

See JUDGES; MANDAMUS.

WATERS AND WATER COURSES.

1. *Diversion—Effect of Acquiescence.* The acquiescence by riparian proprietors for a period of thirty years in the diversion of a stream from its natural channel into a new one is binding to such an extent as to prevent their lawfully returning the stream to its old channel, when new rights have accrued by reason of such long continued divergence.—*Matheson v. Ward*..... 407

2. *Diversion for Municipal Purposes—Rights of Riparian Proprietor.* The right which a lower riparian proprietor has to the usual and undiminished flow of the water in the stream running through or by his land is property, of which he cannot be deprived without the exercise of the power of eminent domain and the payment of just compensation, even where the upper proprietor is a municipal corporation which seeks to divert the waters for a necessary public use.—*New Whatcom v. Fairhaven Land Co.*..... 493

See NAVIGABLE WATERS.

WILLS.

1. *Construction—Death of Devisee.* Under Bal. Code, § 4608, which provides that "Every devise of land in any will shall be construed to convey all the estate of the devisor therein, unless it shall clearly appear by the will that he intended to convey a less estate," a will must be construed as passing an absolute fee-simple title to the devisee named, instead of a life estate, when the

WILLS—CONTINUED.

will devises "the balance of my property, real and personal, to my cripple son, Charles. . . . In case of his death it is my desire that my sole property shall be applied to the school fund of Wilbur," since, in the absence of a clear intent to convey a less estate, it must be construed that the testator had reference to the possibility of the devisee's death before his own.—*Reeves v. School District* 282

2. *Probate of Wills—Questions Cognizable.* Questions as to the construction of a will and as to the vesting of the property mentioned in it are not cognizable in a proceeding to have the will established in probate, the only question for consideration in such a proceeding being the validity of the will.—*Montrase v. Byrne*.... 288

WITNESSES.

1. *Defendant as Witness—Former Conviction.* In a prosecution for horse stealing, it is error to compel defendant, who had offered himself as a witness, to testify that he had once before been convicted of horse stealing, since the tendency of such testimony would be to prejudice the jury, and the demands of the statute permitting conviction of a crime to be shown to affect the credibility of a person offered as a witness are met by proof of the conviction, without unnecessary parade before the jury that defendant had at one time been guilty of the exact crime for which he is at the time on trial.—*State v. Gottfredson* 398
2. *Transactions With Deceased Person—Admissibility.* Bal. Code, § 5991, which provides that no person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action, as a party thereto or otherwise, provided, that in an action or proceeding where the adverse party sues or defends as deriving right or title by, through, or from any deceased person, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with, or any statement made to him by, any such deceased person, has no application where the person offered as a witness was merely a party to the original contract with the deceased person, but is not a party to the suit, either directly or indirectly,

WITNESSES—CONTINUED.

and not bound in any way by the judgment in the particular proceedings in which the testimony of such witness is offered.—*Sackman v. Thomas*..... 660

3. *Same—Communications Between Husband and Wife—Privileged Character.* *Semble*, that Bal. Code, § 5994, which provides that neither a husband nor wife shall, during marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during marriage, is restricted to confidential communications, induced by the marital relation, and not to conversations relating to matters of business since it must be interpreted in conjunction with Bal. Code, §§ 4504, 4505, which provide that contracts may be made by a wife and liabilities incurred, and the same may be enforced by or against her, to the same extent and in the same manner as if she were unmarried, and actions may be instituted by one spouse against the other to establish whether the real estate conveyed to either is community or separate property.—*Id.* 660

See APPEAL, 45; CRIMINAL LAW, 11-13, 18, 19; EVIDENCE, 7; TRIAL, 4.

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